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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-810

CHICKEN DELIGHT, INC., CHICKEN DELIGHT OF CALIFORNIA, INC., and CONSOLIDATED FOODS CORP., *Petitioners,*

vs.

HARVEY SIEGEL and ELAINE SIEGEL, husband and wife, DAVID WITT, ROBERT VAN SCHAICK, RALPH R. ANDRE and RUTH L. ANDRE, husband and wife, and RICHARD ZACHARY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In the Supreme Court
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October Term, 1971

No.

Chicken Delight, Inc., Chicken Delight of California, Inc., and Consolidated Foods Corp., *Petitioners,*

vs.

Harvey Siegel and Elaine Siegel, husband and wife, David Witt, Robert Van Schaick, Ralph R. Andre and Ruth L. Andre, husband and wife, and Richard Zachary, *Respondents.*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review certain portions of the decision and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 9, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 448 F.2d 43. A copy of the opinion as re-

ported therein is attached to this Petition as Appendix A. The District Court's Memorandum Opinion and Order granting, in part, plaintiffs' motion for directed verdict pursuant to Rule 50, Fed. R. Civ. P., is reported at 311 F.Supp. 847 (N.D.Cal. 1970). A copy of the opinion as reported therein is attached to this Petition as Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on September 9, 1971. Thereafter, on November 29, 1971, upon joint application of petitioners and respondents herein, this Court extended the time for filing this Petition for Writ of Certiorari to and including December 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

At issue are the legal standards applicable to contracts under which Chicken Delight's franchisees agree to purchase their requirements of certain essential commodities from their franchisor as a condition of obtaining a license to use the franchisor's trademarks and system of operation. The court below has held that, as a matter of law, such contracts constitute "tying agreements" and that "economic power" sufficient to condemn these contracts as illegal *per se* is irrebuttably presumed from use of registered trademarks as a tying device in standard form franchise agreements. The court also held that, absent

a showing of necessity, such a "tie-in" is not legally justified.

These holdings raise questions of enormous moment to the franchise industry—questions which were before this Court previously but not reached in *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965). In light of the enormous expansion of franchising since *Carvel* and the indisputable impact of the decision below upon American franchising, a writ of certiorari should issue.

In particular, the questions presented for review by this Court are:

1. Where a fast food franchisor licenses franchisees to use its identity, trademarks and system of operation under contracts obligating the franchisees to purchase from the franchisor their full requirements of certain commodities essential to the distinctive identity of the trademark and system, does such a requirements practice, as a matter of law, constitute a tying arrangement under Section 1 of the Sherman Act where the practice has neither the purpose nor the potential of foreclosing competition in the market for any of the alleged tied commodities or of increasing the franchisor's market power over any of such commodities?

2. Is economic power in the alleged tying product sufficient to proscribe the requirements practice described above as illegal *per se* conclusively presumed where the franchisor is the owner of registered trademarks, and licenses such trademarks to numerous franchisees under contracts containing tying provisions?

3. Where a fast food franchisor licenses franchisees to use its identity, trademarks and system of operation under contracts obligating the franchisees to purchase from the franchisor their full requirements of certain commodities essential to the distinctive identity of the trademark and system, but where such requirements practice has neither the purpose nor the potential of foreclosing competition in the market for any of the alleged tied commodities or of increasing the franchisor's market power over any of such commodities, is such a requirements practice justified only where the franchisor establishes that less restrictive alternatives were not available to achieve its legitimate business purposes?

STATUTES INVOLVED

The applicable statutes are 15 U.S.C. §§1, 15 and 26. They provide, in pertinent part, as follows:

15 U.S.C. §1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

15 U.S.C. §15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall re-

cover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. §26:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . ."

STATEMENT OF THE CASE

(a) Nature of the case.

This is a class action antitrust suit brought on behalf of approximately 800 existing and former Chicken Delight franchisees to recover treble damages for injuries purportedly resulting from illegal restraints imposed upon those franchisees under Chicken Delight's standard form franchise agreements.[1] In particular, the franchisees allege

[1]This action was declared maintainable as a class suit under Rule 23(b)(3), Fed.R.Civ.P., by the District Court. *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967). Compare *Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir. 1969) (eliminating claim of price fixing as appropriate for "class" adjudication). Well over 100 franchisees elected to "opt out" of the class under the Rule 23 procedure.

that Chicken Delight's contractual requirement that franchisees purchase certain essential cooking equipment, dry-mix food items and trademark-bearing packaging exclusively from Chicken Delight as a condition of obtaining a license to use Chicken Delight's trademarks, associated symbols and system of operation constitutes a tying agreement which is unlawful *per se* under §1 of the Sherman Act, 15 U.S.C. §1. The franchisees further assert that they have been damaged as a result of having paid allegedly excessive amounts to Chicken Delight for the required items.

Petitioners deny that their contractual practices are properly viewed as tying agreements or that they have in any way unreasonably restrained trade or commerce. Petitioners further deny that respondents or the represented class of franchisees have been damaged in any amount as a result of the challenged practices. The damage issue forms no part of this Petition for Writ of Certiorari.

(b) Chicken Delight's operations and contractual practices.

Commencing operation in 1952, Chicken Delight was one of the innovators in what is sometimes referred to as the "franchise boom" in the fast-food service industry. Over its 19-year existence, Chicken Delight has licensed hundreds of would-be entrepreneurs with little or no background in the food industry, and with limited financial resources, to use the fanciful Chicken Delight trademarks and associated symbols, and to market food products to the public in accordance with its distinctive system of operation and marketing.

Under the standard-form contracts in question here (an exemplar of which is attached to this Petition as Appendix

C), Chicken Delight franchisees are required to produce and deliver to consumers a limited menu of uniquely flavored and prepared products of high quality. A franchisee operating under contract from Chicken Delight is charged no separately stated "front-end" or franchise fee for the benefits conferred under the agreement; nor is he required to make any direct royalty payment to Chicken Delight on a continuing basis. However, as a condition of operating as a Chicken Delight franchisee, the franchisee agrees that he will purchase his full requirements of certain cooking equipment, food products and trademark-bearing paper packaging from the franchisor exclusively, at prices specified in the franchise agreement. The sale of these items (which, with the exception of the cooking equipment, have never been manufactured by Chicken Delight) provide Chicken Delight with virtually its sole source of obligatory[2] revenue. Further, petitioners' requirements practice serves as a vital assurance that each of its franchisees continues to procure and employ those products which are deemed essential to successful operation as a Chicken Delight franchisee.

It is undisputed that Chicken Delight offered the required items for sale only to its franchisees, and only as an incident to their respective operations as authorized Chicken Delight franchise outlets. Similarly, it is undisputed that, at all times, Chicken Delight's market share with respect to each of the required items was less than

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[2]By "obligatory" revenues, petitioners refer to the contractually required *"quid pro quo"* for the Chicken Delight trademark license. Chicken Delight, like virtually all other franchise companies, has offered additional products or services to its franchisees on an optional basis. Petitioners' practices involving these non-required items are not here in issue.

1% of the relevant markets, expressed either in terms of dollar value or unit quantities.

As respects the alleged "tying" product (the Chicken Delight trademarks, trade name and system), although some 1,000 franchisees executed agreements containing the described requirements practice during the period relevant to this litigation, the Chicken Delight trademark license represented but one of many hundreds of investment opportunities for entrepreneurs interested in the restaurant or prepared food business. Further, although Chicken Delight had once been a leader in the fast-food industry, by the mid-60's the company was in a state of competitive decline. During this period dozens of new franchise companies entered the fast-food field offering trademark licenses and franchise operations comparable to Chicken Delight, and many became considerably more successful.

(c) Course of Proceedings Below.

Following extensive pretrial proceedings, trial was commenced before Hon. George B. Harris, sitting with a jury.[3] After five weeks of trial, the court granted, in part, plaintiffs' motion for a directed verdict pursuant to Rule 50, Fed. R. Civ. P., holding that Chicken Delight's requirements practice constituted a tie-in, that the tying product possessed sufficient economic power to condemn the tie-in as illegal *per se*, that the tying arrangement had not been

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[3]By prior pretrial order, the issues at the initial trial were limited to whether Chicken Delight's requirements practice was lawful and, if such practice were found to be unlawful, whether damages in some amount had been proximately caused to respondents and to the represented class. The amount of damage, if any, either on a formulary or individualized basis, was not placed in issue, nor was the claimed liability of Chicken Delight's parent corporation (since 1965), Consolidated Foods Corporation.

justified as a matter of law as respects paper packaging, and that respondents had been damaged in some amount by Chicken Delight's unlawful tying practice. The issue of "quality control" justification with respect to the remaining tied items (i.e., cooking equipment and formulary food items) was submitted to the jury which returned its verdicts in favor of respondents. See App. B at 12-13.

On April 10, 1970 the District Court entered its order decreeing that such verdicts should be enrolled in the minutes of the court as its judgment. Upon motion duly made thereafter by petitioners pursuant to 28 U.S.C. 1292 (b), that order was amended to certify certain controlling questions of law as appropriate for interlocutory review, and on April 27, 1970, the Ninth Circuit agreed to hear the certified questions on the requested interlocutory appeal.

On September 9, 1971, the Court of Appeals rendered its decision herein. In its opinion the court affirmed each of the District Court's rulings with respect to the "legality" issues. However, it reversed the District Court on the damage question holding that a new trial was required to determine whether the franchisees had been damaged in any amount as a result of petitioners' unlawful tying practices, taking into account the respective costs and value of both the tying and tied items.[4]

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[4] As we have noted previously, this Petition treats solely the questions of "legality" as to which the District Court's rulings were affirmed on appeal. It is anticipated that a cross-petition will be filed by the franchisees respecting the Court of Appeals' damage ruling. In such event, petitioners herein will oppose that cross-petition on the ground that the damage portion of the Ninth Circuit's opinion raises no issue meriting consideration by this Court, at least at this juncture of the proceedings.

As respects the "legality" of the Chicken Delight franchise contracts, the Ninth Circuit held that, although the required items were essential to the operation of a Chicken Delight franchise, sale of the franchise license did not "require" the "forced sale" of those items as a condition of either the successful operation by the franchisee or maintenance of trademark identity. Thus, although the court did not consider whether petitioners' requirements practice presented any of the anti-competitive dangers traditionally associated with tie-ins, it held that the Chicken Delight trademark license could properly be viewed as a tying product separate and distinct from the required items; and that the conjunctive "sale" of these items constituted a tie-in under §1 of the Sherman Act.

Having determined that Chicken Delight's franchise contracts constituted tying agreements, the court further held that sufficient economic power in the presumed tying product was irrebuttably established by the existence of Chicken Delight's registered trademarks and their use as a tying device in the company's standard form franchise contracts. Its holding in this respect was purportedly based upon the recent decision of this Court in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

On the issue of justification, the court held that the District Court's standard of strict necessity was properly applicable with respect to both its directed verdict ruling (paper packaging) and its instructions to the jury concerning the remaining required items. Although the court recognized the pertinence of the franchisor's need to preserve "the distinctiveness, uniformity and quality of its product," it held that absent a showing that specifications

for the required items could not practicably have been supplied, Chicken Delight's requirements practice was not justified.

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED TO DETERMINE THE LEGAL STANDARDS PROPERLY APPLICABLE TO CHICKEN DELIGHT'S STANDARD FORM FRANCHISE AGREEMENTS

A. Chicken Delight's Franchise Contracts Should Not Be Considered Tying Agreements Since They Do Not Present the Anti-Competitive Dangers Traditionally Associated with Tie-ins.

As respects the legality of Chicken Delight's franchise contracts, the issue presented is whether such contracts are properly regarded as tying agreements under Section 1 of the Sherman Act. The court below held, as a matter of law, that they are. It reasoned that, in the franchising context, a trademark can be a tying product, apart from the items it identifies, so that the required purchase of certain commodities by Chicken Delight's franchisees constituted a tie-in. The court's opinion, however, fails to consider the purposes served by the special tying rules and thus leaves important questions of law respecting franchise tie-ins in an unsettled and unsatisfactory state. Petitioners submit that their franchise agreements do not present the anti-competitive danger of market power extension which is traditionally associated with tie-ins and that there is, therefore, no economic or legal justification for treating these contracts as tying agreements.

A tie-in under the antitrust laws is traditionally defined as an agreement under which a seller refuses to sell one

product (the tying product) unless the buyer also purchases a second product (the tied product). In a series of decisions,[5] this Court has held that such agreements are generally to be regarded as *per se* antitrust violations on the assumption that they "serve hardly any purpose beyond the suppression of competition" in the market for the tied products: *Standard Oil Co. of Calif. v. United States*, 337 U.S. 293, 305-06 (1949). However, the courts have refused to apply *per se* tying rules to purchase restrictions which, though capable of a tying characterization, do not present a potential for anticompetitive market expansion. Most prominent, and directly applicable to this case, are the many decisions involving "requirements" or "exclusive dealing" practices. These decisions have rejected a *per se* approach and have stressed the need for evaluating the challenged restraints by reference to their market setting. Moreover, in the "exclusive dealing" area it is established that a contractual requirements obligation violates the antitrust laws *only* where it forecloses competition in a substantial share of the market affected thereby. See, *e.g.*, *Tampa Electric Co. v. Nashville Coal Co.*; 365 U.S. 320 (1961); *Standard Oil Co. of Calif. v. United States, supra.*

The reason for these sharply different standards applicable to "exclusive dealing" and true "tying" arrangements does not lie, as the Ninth Circuit apparently holds, merely in the conjunctive marketing of items which are conceptually severable. Indeed, the exclusive dealing cases

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[5] See, e.g., *Fortner Enterprises, Inc. v. U. S. Steel Corp.*, 394 U.S. 495 (1969); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *International Salt Co. v. United States*, 332 U.S. 392 (1947); see also *White Motor Co. v. United States*, 372 U.S. 253 (1963).

usually involve such linking: the conditioning of an initial sale upon the further purchase of products during the period of the requirements clause, and, in many of the cases, conditioning of the right to operate under the seller's trade name upon the purchase from the seller of products to be sold under that name.[6]

Thus, whether an agreement is properly considered a tie-in turns not upon the mere coupling of physically separable objects, but upon the combining of a dominant desired product with the "forced purchase of a second distinct commodity" *for the purpose of market extension.* As this Court has stated: "[T]he essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market *to expand his empire into the next.*" (*Times-Picayune Publishing Co. v. United States, supra,* at 611, emphasis added). Hence, the unreasonableness of tying arrangements lies in the seller's artificial transfer of "economic power with respect to the tying product to appreciably restrain free competition" in a different market where he has shown no competitive justification for business success. *Northern Pacific Ry. Co. v. United States, supra*

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[6]See, *e.g.*, *Anchor Serum Co. v. F.T.C.*, 217 F.2d 867 (7th Cir. 1954) (wholesalers' agreement to purchase all requirements of cholera serum from seller in consideration of right to do business under seller's trade name expressly distinguished from tying arrangement and held properly adjudicated under requirements standards); *Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11 (6th Cir. 1959) (legality of Ford dealer's agreement to sell only Ford replacement parts in premises on which a dealer displays Ford trademark or trade name held dependent upon exclusive dealing standard of whether arrangement forecloses competition in substantial share of the line of commerce involved); *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (9th Cir. 1964) (rejecting tying standard of quantitative substantiality and applying exclusive dealing standards to dealer's agreement to purchase from Tidewater his requirements of petroleum products to be sold at service station leased from Tidewater and bearing its name).

at 6; see generally, Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957).

The opinion of the Ninth Circuit improperly ignores this crucial focus of market extension. Although the potential for such market extension, or power transfer, is the fundamental reason why tie-ins are condemned as unlawful *per se*, the court below did not even consider whether Chicken Delight's contractual practices were in any way intended to, or had the potential of, extending its economic power from one market into another.

The error of the Ninth Circuit's analysis is not its determination that a trademark *can* be a tying product (for it surely can) but its failure to determine whether in the case at bar petitioners' trademarks were in fact *used* as a tying device, *i.e., with the purpose or effect of market power extension.* The court's decision apparently treats as a tie-in any arrangement under which franchisees agree to purchase commodities from their franchisor as a condition of obtaining the franchise (trademark) license—at least where the so-called tied items are not manufactured by the seller. (App. A at 6-9). This is true without regard to whether the arrangement (a) substantially forecloses competing suppliers of the tied items or (b) extends the seller's market power over any of the allegedly tied products. However, in the absence of such market effects, or potential therefor, there is simply no reason to analyze a trademark license as a separate product, distinct from essential commodities which are required for purchase in combination therewith, so as to justify application of the rigorous *per se* tying rules.

The evidence at trial established that the name "Chicken Delight" was developed as a fanciful designation for food

products uniquely prepared and delivered to the consumer by franchise operators who agreed to pay a specified sum for the required commodities in lieu of a franchise fee. There was no evidence—indeed, plaintiffs did not contend—that Chicken Delight at any relevant time attempted to establish itself in the market for any of the tied items independent of its franchise business, or that it received any special rebates or discounts from the third party manufacturers of the required items. In fact, it is clear that with respect to the majority of the allegedly tied items, Chicken Delight did no more than purchase the required items from various manufacturers and distribute them to its franchisees as an incident to its franchise operation. There was, in short, no potential under the Chicken Delight system for an effective transfer or extension of the franchisor's market power into the markets for any of the so-called tied items.[7] Compare Note, *Franchises, Requirements Contracts and Tie-Ins: One Test for A Tangled Two*, 74 Yale L.J. 691, 698-99 (1965).

Petitioners do not, of course, suggest that their contractual purchase requirements are immune from scrutiny under the antitrust laws. To the extent that suppliers have

[7] In its opinion below, the Ninth Circuit apparently viewed the fact that Chicken Delight did not manufacture most of the "tied" items as a basis for its finding that petitioners' franchise contracts were in fact tying agreements. For the reasons set forth in text above, this conclusion would appear to state the case in reverse. At least in the absence of evidence showing that Chicken Delight received special rebates or other concessions from the third party manufacturers—which was neither alleged nor proven—petitioners derived no market advantage in either the tied or tying markets from its contractual practices. This point was apparently recognized by the majority in *Susser v. Carvel, supra*. Although Judge Friendly's opinion did not deal at length with the "manufacturer/purchaser" distinction, he did point to the fact that "it remained open to competing suppliers to bid for the Carvel business by soliciting that company" as "itself an important contrast with cases where the tied item is produced by the seller." (332 F. 2d at 519).

been excluded from a relevant market for one or more of the tied commodities the public interest is fully protected by the fact that petitioners' practices remain open to scrutiny as requirements or exclusive dealing arrangements. Compare authorities cited, *supra*, at 12-13. Any exclusion of suppliers, however; operated only to the extent of purchases made by Chicken Delight's franchisees, and it is undisputed that these purchases at no time accounted for as much as one percent of the relevant market for any of the allegedly tied items. Respondents concede that they have not and cannot demonstrate that Chicken Delight's requirements practice in fact produces an adverse effect upon competition in any relevant market. Thus, if requirements standards obtain, Chicken Delight's practices are admittedly lawful under the decisions in *Tampa Electric* and *Standard Oil, supra.*

B. The Writ Should Be Granted Because of the Crucial Importance of this Issue to the Parties and to the Franchise Industry.

The expansion of franchising has been one of the most important economic phenomena in American commerce during the past fifteen years. It is presently estimated that franchise sales may account for as much as 10 percent of the gross national product and over one-fourth of all retail sales.[8] What is more, since the franchising industry has

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[8] *Hearings on S. 2507 and S. 2321 before the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. (1967) (remarks of Senator Hart); Burck, *"Franchising's Troubled Dream World"*, 81 FORTUNE 116, 118 (1968); Thompson, *Franchise Operations and Antitrust Law*, 44 J. RETAILING 39 (1969). These sources estimate that, including both "product" and "image" franchising, there are approximately 400,000-600,000 franchise outlets at present with gross sales between 80 and 100 billion dollars annually. See also, *e.g.*,

been built largely upon the licensing of trademarks which identify the franchisor's unique commodities or methods of product preparation or distribution, the decision below goes to the very heart of that industry and its potential impact is immense. Despite the Ninth Circuit's suggestion that Chicken Delight's operation was somehow unique among franchisors (App. A at 12), the numerous cases which have arisen in the wake of the lower court decisions herein suggest that its practices are by no means uncommon.[9]

The question raised here has been before this Court on only one prior occasion, in the *Carvel* litigation. *Susser v. Carvel Corp., supra.* Compare also *Carvel Corp.*, [1965-1967 Transfer Binder] Trade Reg. Rep. ¶17,298 (FTC 1965). As noted, although *certiorari* was initially granted in *Carvel*, the petition was dismissed after oral

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F.T.C., *Report of Ad Hoc Committee on Franchising* (1967) 6-7 (". . . franchising has now become a matter of widespread interest and great importance to the business community."); WALL STREET JOURNAL, November 14, 1969, at 12, col. 3 ("A major phenomenon of American business in the past decade has been the swift growth of franchising"); Oxenfeldt & Thompson, *Franchising in Perspective*, 44 J. RETAILING 3 (1969) ("Franchising virtually exploded in the United States [in the 1950's] and became the most rapidly growing form of business organization.")

[9]Attached as Appendix D is a partial list of recently filed cases which petitioners believe raise some or all of the issues before this Court on the present Petition. Petitioners believe that this list, while undoubtedly incomplete, is a persuasive indication of the significance of the issues presented to the franchise industry.

The district court decision also produced substantial academic and professional commentary. See, *e.g.*, McCarthy, *Trademark Franchising and Antitrust: The Trouble With Tie-Ins*, 58 CALIF. L. REV. 1085 (1970); Note, 84 HARV. L. REV. 1717 (1971); Note, 19 J. PUB. LAW 411 (1970); Note, 5 GA. L. REV. 151 (1970); *cf.* Gilson, *Equal Justice Under Trademark Law*, 61 TRADEMARK RPTR. 349 (1971); BNA, *Patent, Trademark & Copyright Journal*, 6/3/71 at A-1.

argument as improvidently granted, apparently because of the insufficient record before the Court. [381 U.S. 125]

It is of note that in the one prior case to reach this Court, parallel proceedings in the Second Circuit Court of Appeals and the Federal Trade Commission resulted in apparently opposite conclusions respecting the classification of Carvel's contractual practice as a "requirements" or "tying" arrangement. The Second Circuit found that Carvel's franchise contracts were properly considered tie-ins. The majority (Judges Friendly and Medina) held, however, that the agreements were not unlawful because the Carvel trademarks (the assumed tying product) did not possess sufficient economic power. (See discussion *infra* at 23-24).

By contrast, when the issue was presented to the Federal Trade Commission, the Commission found that the Carvel contracts did not constitute tying agreements:

> "Carvel's franchise agreements cannot be regarded as tie-in arrangements because the trademark license conceptually cannot constitute a 'tying' product and, even if it could, it could never be regarded as a separable 'product' apart from the mix and commissary items to which it is attached within the meaning of the typical tie-in arrangement." (¶17,298 at 22,425).

Since the decisions of the Court and Commission in the *Carvel* cases, franchising has, as noted, expanded geometrically. In light of the unquestioned importance of the instant litigation to franchisors and franchisees alike, as well as the seeming inconclusiveness of the appellate decisions in both *Carvel* and the instant case, petitioners submit that the issues presented warrant consideration by this Court.

II

THE WRIT SHOULD BE GRANTED TO DETERMINE THE QUANTUM OF PROOF NECESSARY TO ESTABLISH SUFFICIENT ECONOMIC POWER IN THE TYING PRODUCT AS A MATTER OF LAW.

The Court of Appeals correctly noted that whether an agreement constitutes a tie-in depends not only upon the nature of the transaction or agreement in issue (which we have discussed above), but also upon whether the asserted tying product "possesses sufficient economic power to appreciably restrain free competition in the tied product market." (App. A at 9).[10] Relying upon the recent decision of this Court in *Fortner Enterprises Inc. v. United States Steel Corp., supra,* the Ninth Circuit held that use of Chicken Delight's registered trademarks as an assumed tying device in an "appreciable number" of franchise contracts irrebutably established such power as a matter of law. (App. A at 10).

Petitioners submit that the court's conclusion with respect to the "economic power" issue requires review on two grounds: First, although the decision below purports to do no more than apply the teaching of *Fortner,* it has, in effect, materially extended that decision by converting an evidentiary presumption of economic power into irrebutable proof. Indeed, the effect of its holding is seemingly to eliminate economic power as an issue in tying cases. Second, the Ninth Circuit's analysis of the "economic power" issue is concededly contrary to the decision of the

[10]The court's opinion further noted that to the extent the "substantiality" of affected commerce raises a separate question under Section 1 of the Sherman Act, the point is conceded by petitioners, and is consequently not in issue. (App. A at 4). That is, of course, correct.

Second Circuit in *Susser v. Carvel Corp., supra.* (See App. A at 12 n.7). Although the court below attempts to dismiss this conflict in light of the intervening decision in *Fortner,* petitioners submit that no easy resolution of that conflict is possible inasmuch as the Second Circuit's view of the evidence relevant to economic power conforms fully with the decisions of this Court, including *Fortner.*

A. The Decision in Fortner Enterprises Did Not Purport to Establish An Irrebutable Presumption of Economic Power.

In *Fortner,* this Court confronted a determination by both the District Court and Court of Appeals that, as a matter of law (on motion for summary judgment *by defendants),* defendants' offer of credit on condition that the borrowers purchase prefabricated steel homes from a United States Steel Corporation subsidiary was not an illegal tie-in. In a five to four decision this Court reversed and remanded for trial, holding that on the record before the Court it was impossible to conclude as a matter of law that defendants did not possess sufficient economic power over the asserted tying product (there, credit). Thus, the mandate in *Fortner* was a direction to the District Court to *try* the issue of economic power to determine whether defendants' assertedly "unique and unusual" financing terms *as a matter of evidence* demonstrated sufficient economic power over the tying product to bring the challenged arrangement within the *per se* standards of the Sherman Act. See 394 U.S. at 505-06.

Indeed, in setting forth the standards to be applied at trial in ascertaining the fact of economic power, this Court explicitly pointed out that the existence of a "competitive advantage" in the tying product market *(i.e.,*

economic power) "[could not] be inferred simply because the kind of financing terms offered" were "unique and unusual." (394 U.S. at 505). That determination, the Court held, depended upon the facts adduced "when the case goes to trial," and defendants were explicitly invited to show that their practices "[served] legitimate business purposes" and that they did not, in fact, "have a competitive advantage" in the tying product market (394 U.S. at 506).

The decision below extends *Fortner* in a manner neither required, nor seemingly anticipated, by that case. As noted, the Ninth Circuit held that the existence of Chicken Delight's trademarks plus their use as a tying device in a substantial number of franchise agreements was, without more, proof of economic power sufficient to take the issue away from the trier of fact on a motion for directed verdict under Rule 50, Fed. R. Civ. P. In so holding, petitioners submit that the court improperly transformed *Fortner's* evidentiary or inferential standard of proof into ironclad rules for determination of the economic power issue as one of law.

Indeed, as petitioners understand the decision below, the court would effectively read the question of economic power out of tying cases, at least where the asserted tying product is a patent, a copyright, or as here, a trademark. For the Ninth Circuit's test of economic power is not a test at all—but a circle: whether Chicken Delight's contractual practices are illegal depends upon proof of economic power and such economic power is proved by the existence of Chicken Delight's contractual practices. Compare App. A at 10.

But the concept of economic power in tying cases derives from the fact that a tie-in involves a presumed transfer of economic leverage from a dominant product into another (tied product) market area. If the seller has no competitive advantage over its competitors, then, as a matter of fact, there can be no power transfer and there is no basis to condemn its contractual practices, whatever their form, as a tie-in.

Here, petitioners introduced or offered evidence at trial to establish that, at all relevant times, Chicken Delight's trademarks never afforded the company more than an ability to compete on even terms for prospective franchisees, that competition for franchise operators remained vigorous and open and that, because, *inter alia,* of the very low capital outlay required to commence operation, there was at no time any substantial barrier to the entry of new franchise firms. Indeed, although Chicken Delight had been an early pioneer in the franchise industry, in recent years its success was significantly over-shadowed by the dramatic expansion of Colonel Sanders' Kentucky Fried Chicken and by other fast food franchising operations such as McDonalds, Mr. Donut and Burger Chef, to name but a few. Beyond the franchising perspective, Chicken Delight presented but one of thousands of investment opportunities to a party interested in the retail food business.

The ruling of the court below that such evidence was not even probative of the market power issue is surely not a conclusion which derives directly from the teaching of the majority in *Fortner.* Whether that teaching should be so extended is an issue which this Court ought to con-

sider, particularly in light of the seemingly uncertain decisions subsequent to *Fortner*.[11]

B. The Decision Below is Contrary to the Opinion of the Second Circuit Court of Appeals in Susser v. Carvel.

The court below concedes that its resolution of the "economic power" issue is in direct conflict with the earlier decision of the Second Circuit in the *Carvel* litigation. App. A at 12 (n. 7). It suggests, however, that *Carvel* has been effectively overruled by this Court's subsequent decision in *Fortner*.

Petitioners respectfully disagree. While *Fortner* unquestionably deals with the standards applicable to a determination of market power, that case does not purport to speak to the issue which was before the court in *Carvel* and in the instant litigation: whether utilization of a seller's registered trademarks as a supposed tying device in an appreciable number of franchise contracts creates an irrebuttable showing of economic power sufficient to deprive the seller of the right to produce evidence of a countervailing nature.

For the reasons set forth above (at 20-22), that issue has not been settled by this Court. And, as to such issue, the opinions of the Second and Ninth Circuits remain in direct conflict. Contrary to the decision below, the

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[11] *E.g., Advance Business Systems & Supply Corp. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *Smith v. Scrivner-Boogaart, Inc.*, 447 F.2d 1014 (10th Cir. 1971). See also the decision on remand in *Fortner*, where the District Court directed a verdict for plaintiff on the "tying" issue at trial. *Fortner Enterprises, Inc. v. United States Steel Corp.*, *appeal pending*, Sixth Cir., No. 71-1194, as well as the admitted conflict between the Ninth Circuit's opinion here and the Second Circuit's decision in *Susser v. Carvel*, *supra* (discussed hereafter).

majority in *Carvel* not only considered the type of evidence proffered by petitioners as relevant to the question of market power, but held, on the facts there presented, that the Carvel trademarks did *not* possess sufficient economic power to give the seller (Carvel) an advantage over its competitors in the fast food industry. Whether the result after trial would be the same in the instant litigation is of no moment. Petitioners suggest only that they are entitled to present their evidence to rebut any *prima facie* showing or presumption of economic power, established by the existence and utilization of the Chicken Delight trademarks, and that—as to such issue—there is a direct conflict in the decisions of the Second and the Ninth Circuits.

III

THE WRIT SHOULD BE GRANTED TO DETERMINE THE LEGAL STANDARDS FOR ASCERTAINING WHETHER A FRANCHISE ARRANGEMENT FOUND TO CONSTITUTE A TIE-IN IS JUSTIFIED BY LEGITIMATE BUSINESS PURPOSES.

Despite the *per se* label sometimes applied to tying arrangements, the courts have uniformly recognized that even where a practice is properly regarded as a tie-in, it may nonetheless be justified in circumstances where it demonstrably serves legitimate business purposes.[12] At

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[12] *Fortner Enterprises, Inc. v. United States Steel Corp.*, *supra*, at 506 ("It may turn out that the arrangement here serves legitimate business purposes . . . ."); *Advance Business Systems & Supply Co. v. SCM Corp.*, *supra* at 68-69; *Susser v. Carvel Corp.*, *supra*; *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403 (5th Cir. 1962); *Dehydrating Process Co. v. A. O. Smith Corp.*, 293 F.2d 653 (1st Cir. 1961); *Teleflex Industrial Products, Inc. v. Brunswick Corp.*, 293 F. Supp. 106, 110 (E.D. Pa. 1968) ("It is

trial, Chicken Delight offered evidence and appropriate instructions which would have permitted the jury to find that its requirements practice served the important function of assuring that its franchisees uniformly used products meeting the quality standards necessary to the distinctive identity of the Chicken Delight trademark. Although the Ninth Circuit expressly recognized that such a quality control or "market identity" purpose is important to the preservation and success of a franchise system, it rejected petitioners' justification defense on the sole ground that petitioners did not show that it would have been impracticable to furnish specifications for the required commodities.

Petitioners respectfully submit that the court's justification ruling merits review for two reasons. First, the Ninth Circuit has failed to articulate a standard of justification which takes into account the competitive impact of the challenged practice. Additionally, the test of justification as applied fails to take into account the special considerations appropriate to cases involving franchising.

A. The Decision Below Fails to Consider the Competitive Effect of the Challenged Tie-In in Establishing a Standard of Justification.

In its decision below, the court approached the question of "justification" as an issue separate from the actual ty-

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an established principle that a proper business reason may justify what might otherwise be an unlawful tie-in."); *Englbrecht v. Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962); *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 559 (E.D. Pa. 1960); *aff'd per curiam*, 365 U.S. 567 (1961) ("The facts must be examined to ascertain whether or not there are legitimate reasons for selling normally separate items in combined form to dispel any influence that it is really a disguised tie-in").

ing practice before the court. Rather, the court suggested that the standard of justification to be applied in any tying case is a strict test of impracticability. Petitioners suggest, however, that proper regard for the purposes to be served by the "justification" defense requires a court to strike a balance between the demonstrated anti-competitive potential of the tie-in and the asserted business reasons which underlie its adoption.

On our view, the "justification" issue simply presents the obverse side of the question discussed above with respect to whether a challenged agreement is properly regarded as a tie-in in the first instance. See pages 11-16, *supra*. We there suggested that whether an agreement is properly viewed as a tie-in should turn, not merely upon its conceptual characteristics, but upon whether the practice actually or potentially extends the seller's economic power into the tied product markets. On that test, Chicken Delight contends that its standard form franchise contracts are not properly so regarded. Assuming, however, that as a conceptual matter its agreements are deemed to constitute tie-ins under §1 of the Sherman Act, it should properly remain open for petitioners to justify their practice by showing (a) that the alleged tie-in has no actual or potential anti-competitive effect in the relevant tied product markets and (b) if such showing be made, that the tie-in was motivated by a legitimate business purpose and was a reasonable means of achieving that purpose.

This standard of justification is fully consistent with the *per se* approach to tie-ins. A plaintiff could establish a *prima facie* case of illegality merely by showing the nature of the challenged practice and the existence of suf-

ficient economic power in the tying product, without any need to prove a substantial or unreasonable anti-competitive effect on competition. But since the *per se* rule does not conclusively condemn tie-ins (as reflected by the traditional recognition of the justification defense), the seller should nonetheless be able to rebut this presumption of illegality by establishing that, in a given case, the tie-in does not present the anti-competitive danger of market power extension which the tying rules seek to prevent. If such proof be made, the focus of the inquiry should then shift to the reasonableness of the challenged restraint in light of the legitimate business purposes supporting its use.

B. The Decision Below Fails to Consider the Nature of Franchising in Establishing a Standard of Justification.

The narrow approach to justification taken below further fails to consider whether a strict standard of impracticability, which is properly applied in some circumstances, should apply to claims of quality control by franchisors, such as petitioners. By its nature, image franchising requires the franchisor to assure the maintenance of quality control and product uniformity among its franchise operators. Indeed the very essence of the court's holding that Chicken Delight's trademark license could be a tying product is its determination that, in the franchising context, the principal value of a trademark is that it denotes the good will and quality standards of the enterprise which the mark identifies. (See App. A at 7-8).

The court nonetheless concluded that petitioners' claim of quality control was insufficient on the ground that specifications for the required commodities *could have been*

supplied. Yet, in the franchise context, such a standard is simply impractical. The franchisor's interest—indeed, its obligation—is not simply to establish specificatons but to insure that each of its franchisees, situate throughout the nation, is in fact uniformly procuring and using products which meet its quality requirements. Particularly in a food franchising operation, such as Chicken Delight, the need for stringent controls, as well as the difficulty of achieving such controls by a mere specifications practice, is acute. The evidence introduced at trial supports Chicken Delight's judgment that assurance of product uniformity and quality throughout its system was achievable through the requirements practice actually used, but could not have been maintained under a specifications practice which would have involved unnecessary difficulty and expensive policing, not only of the numerous franchisees, but of multiple suppliers.

Again, the Second Circuit's opinion in the *Carvel* litigation explicitly recognized the pertinence of these considerations. After noting that in the ordinary tying case availability of a specifications practice generally precludes a successful claim of justification, the court continued:

> "Although instances of impossibility of control through specification may indeed be rare in cases involving the proper functioning of mechanical elements of a machine [cites omitted], such cases are scarcely relevant to the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae; that Carvel was able to specify this to its source of supply, whose product it regularly checked, does not show that administration could be confided to 400 dealers." (332 F. 2d at 520).

Although the court did not refer to the contrary view of the Second Circuit in its discussion of "justification" below, we believe not only that such a conflict exists but that *Carvel* represents the more considered view.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that a writ of certiorari be granted to review the questions presented herein.

Dated, San Francisco, California,
December 16, 1971.

Respectfully submitted,

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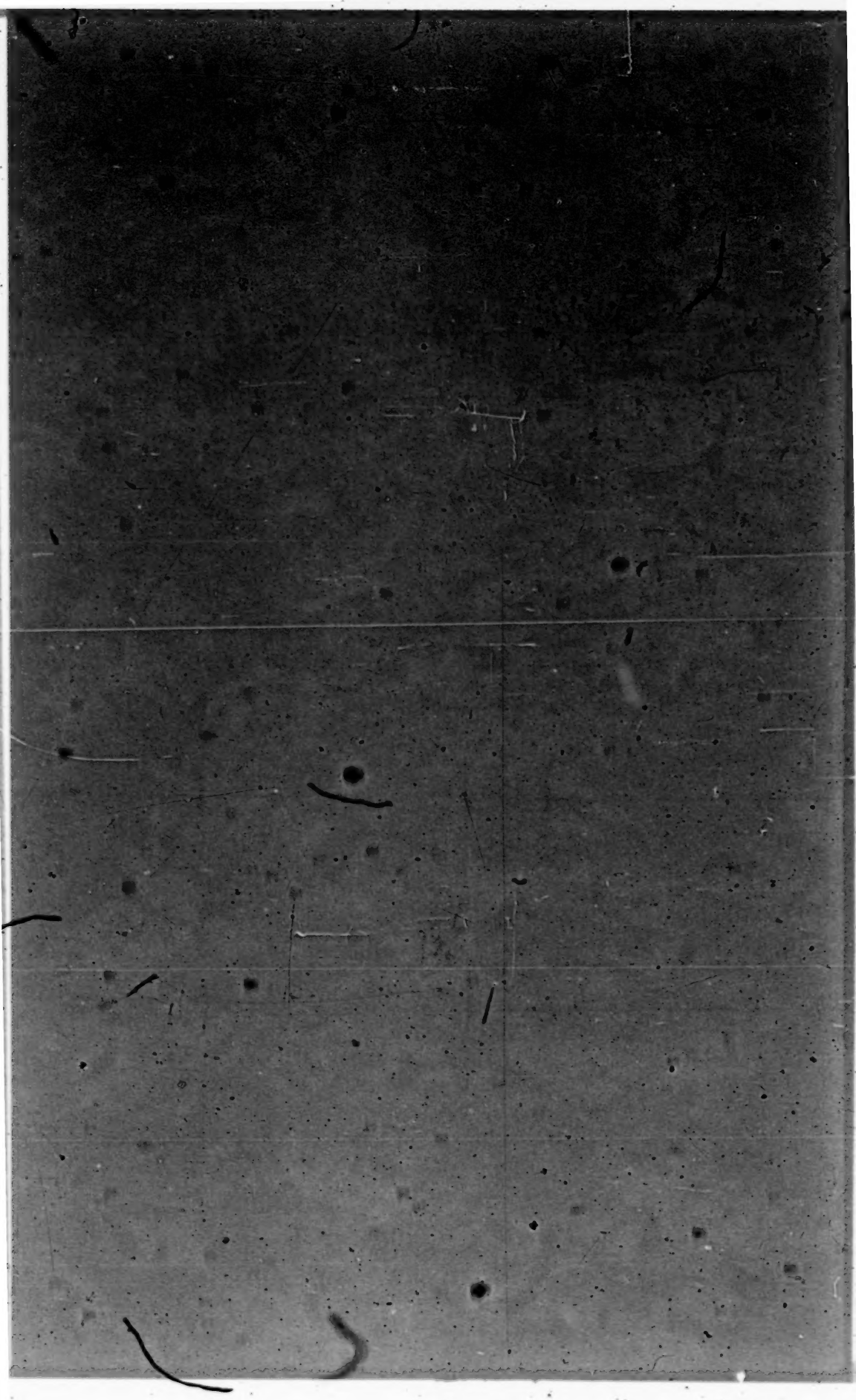
(Appendices Follow)



Appendix A

United States Court of Appeals
Ninth Circuit

Nos. 25908, 26860

Harvey Siegel and Elaine Siegel, husband and wife, et al.,
Plaintiffs-Appellees,

vs.

Chicken Delight, Inc., et al.,
Defendants-Appellants.

Chicken Delight, Inc., et al.,
Appellants-Petitioners,

vs.

George B. Harris, District Judge,
Respondent,
Harvey and Elaine Siegel, et al.,
Real Parties in Interest.

Sept. 9, 1971

Before MADDEN, Judge of the United States Court of Claims, and MERRILL and HUFSTEDLER, Circuit Judges.

MERRILL, Circuit Judge:

This antitrust suit is a class action in which certain franchisees of Chicken Delight seek treble damages for injuries allegedly resulting from illegal restraints

imposed by Chicken Delight's standard form franchise agreements. The restraints in question are Chicken Delight's contractual requirements that franchisees purchase certain essential cooking equipment, dry-mixed food items, and trade-mark bearing packaging exclusively from Chicken Delight as a condition of obtaining a Chicken Delight trade-mark license. These requirements are asserted to constitute a tying arrangement, unlawful per se under § 1 of the Sherman Act, 15 U.S.C. § 1.

After five weeks of trial to a jury in the District Court, plaintiffs moved for a directed verdict, requesting the court to rule upon four propositions of law: (1) That the contractual requirements constituted a tying arrangement as a matter of law; (2) that the alleged tying products—the Chicken Delight name, symbols, and system of operation—possessed sufficient economic power to condemn the tying arrangement as a matter of law; (3) that the tying arrangement had not, as a matter of law, been justified; and (4) that, as a matter of law, plaintiffs as a class had been injured by the arrangement.

The court ruled in favor of plaintiffs on all issues except part of the justification defense, which it submitted to the jury. On the questions submitted to it, the jury rendered special verdicts in favor of plaintiffs. The opinion of the District Court and the special verdicts appear at 311 F.Supp. 847 et seq. Pursuant to an order of April 27, 1970, Chicken Delight has taken this interlocutory appeal from the trial court rulings and verdicts.

I. FACTUAL BACKGROUND

Over its eighteen years existence, Chicken Delight has licensed several hundred franchisees to operate home delivery and pick-up food stores. It charged its franchisees no franchise fees or royalties. Instead, in exchange for the license granting the franchisees the right to assume its identity and adopt its business methods and to prepare and market certain food products under its trade-mark, Chicken Delight required its franchisees to purchase a specified number of cookers and fryers and to purchase certain packaging supplies and mixes exclusively from Chicken Delight.[1] The prices fixed for these purchases were higher than, and included a percentage markup which exceeded that of, comparable products sold by competing suppliers.

II. THE EXISTENCE OF AN UNLAWFUL TYING ARRANGEMENT

In order to establish that there exists an unlawful tying arrangement plaintiffs must demonstrate *First*, that the scheme in question involves two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is also purchased. Times-Picayune Publishing Co. v.

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[1]From the organization's beginning in 1952 until 1959, the franchises were required to purchase, in addition to the cookers and fryers, the batter mix and two types of packaging. Additional packaging items were added in 1959 and in 1961; and in 1963, the beginning of the period in question in this suit, barbecue rib seasoning mix which had previously been specified to and made by the franchisees became a required item. More packaging items were added in 1963 and 1964.

United States, 345 U.S. 594, 613-614, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). *Second,* that the tying product possesses sufficient economic power appreciably to restrain competition in the tied product market. Northern Pacific R. Co. v. United States, 356 U.S. 1, 6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). *Third,* that a "not insubstantial" amount of commerce is affected by the arrangement. International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947). Chicken Delight concedes that the third requirement has been satisfied. It disputes the existence of the first two. Further it asserts that, even if plaintiffs should prevail with respect to the first two requirements, there is a *fourth* issue: whether there exists a special justification for the particular tying arrangement in question. United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (E.D.Pa.1960), aff'd per curiam, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961).

A. *Two Products*

The District Court ruled that the license to use the Chicken Delight name, trade-mark, and method of operations was "a tying item in the traditional sense," 311 F.Supp. at 849, the tied items being the cookers and fryers, packaging products, and mixes.

The court's decision to regard the trade-mark or franchise license as a distinct tying item is not without precedent. In Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), all three judges regarded as a tying product the trade-mark license to ice cream

outlet franchisees, who were required to purchase ice cream, toppings and other supplies from the franchisor. *See also* Baker v. Simmons Co., 307 F.2d 458, 466-469 (1st Cir. 1962). Nevertheless, Chicken Delight argues that the District Court's conclusion conflicts with the purposes behind the strict rules governing the use of tying arrangements.

The hallmark of a tie-in is that it denies competitors free access to the tied product market, not because the party imposing the arrangement has a superior product in that market, but because of the power or leverage exerted by the tying product. Northern Pac. R. Co. v. United States, *supra*. Rules governing tying arrangements are designed to strike, not at the mere coupling of physically separable objects, but rather at the use of a dominant desired product to compel the purchase of a second, distinct commodity. Times-Picayune Publishing Co. v. United States, *supra*, 345 U.S. at 614, 73 S.Ct. 872, 97 L.Ed. 1277. In effect, the forced purchase of the second, tied product is a price exacted for the purchase of the dominant, tying product. By shutting competitors out of the tied product market, tying arrangements serve hardly any purpose other than the suppression of competition. Standard Oil Co. v. United States, 337 U.S. 293, 305-306, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

Chicken Delight urges us to hold that its trademark and franchise licenses are not items separate and distinct from the packaging, mixes, and equipment, which it says are essential components of the

franchise system.[2] To treat the combined sale of all these items as a tie-in for antitrust purposes, Chicken Delight maintains, would be like applying the antitrust rules to the sale of a car with its tires or a left shoe with the right. Therefore, concludes Chicken Delight, the lawfulness of the arrangement should not be measured by the rules governing tie-ins. We disagree.

In determining whether an aggregation of separable items should be regarded as one or more items for tie-in purposes in the normal cases of sales of products the courts must look to the function of the aggregation.[3] Consideration is given to such questions as whether the amalgamation of products resulted in cost savings apart from those reductions in sales expenses and the like normally attendant upon any

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[2] Appellant, in urging us not to distinguish between the trademark and the product it represents, relies in part upon Supreme Court language to the effect that there is no property in a trademark except as a right appurtenant to an established business in connection with which the mark is employed. United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97, 39 S.Ct. 48, 63 L.Ed. 141 (1918). But the Court did not mean that a mark and the product or business which it identifies are one and the same; it meant simply that, unlike a copyright or a patent, a trade-mark does not confer upon its owner the right to prohibit a competitor's use of the mark unless the owner himself uses the mark in connection with an existing business.

[3] *See generally*, McCarthy, "Trademark Franchising and Antitrust: The Trouble with Tie-Ins," 58 Calif.L.Rev. 1085, 1108 (1970); Turner, "The Validity of Tying Arrangements Under the Antitrust Laws," 72 Harv.L.Rev. 50, 67-72 (1958); *cf.*, Fortner Enterprises Inc. v. United States Steel Corp., 394 U.S. 495, 506-509, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969).

tie-in, and whether the items are normally sold or used as a unit with fixed proportions.[4]

Where one of the products sold as part of an aggregation is a trade-mark or franchise license, new questions are injected. In determining whether the license and the remaining ("tied") items in the aggregation are to be regarded as distinct items which can be traded in distinct markets consideration must be given to the function of trade-marks.

The historical conception of a trade-mark as a strict emblem of source of the product to which it attaches has largely been abandoned. The burgeoning business of franchising has made trade-mark licensing a widespread commercial practice and has resulted in the development of a new rationale for trade-marks as representations of product quality.[5] This is particularly true in the case of a franchise system set up not to distribute the trade-marked goods of the franchisor, but, as here, to conduct a

[4] It should be readily apparent that, measured against these tests, the package sales here in question are quite different from the sale of an automobile and its tires or a left shoe and the right. In particular, there are several factors in this case which other courts have deemed sufficient to find a tie-in. Undisputed testimony at trial established that other franchisors in fast food businesses similar to that of Chicken Delight sold their licenses separate from the essential supplies. The various supplies sold here were sold individually and in differing amounts, rather than in a preassembled package, and the franchisees were billed accordingly. At no time were the franchises required to purchase all their various supplies from Chicken Delight. Chicken Delight did not itself manufacture the tied items. *See* Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 764 (6th Cir. 1965); United States v. Jerrold Electronics Corp., *supra*, 187 F.Supp. at 559.

[5] *See generally*, McCarthy, *supra*, note 3 at 1112-13; Note, "Quality Control and the Antitrust Laws in Trade-mark Licensing," 72 Yale L.J. 1171 (1963).

certain business under a common trade-mark or trade name.[6] Under such a type of franchise, the trade-mark simply reflects the goodwill and quality standards of the enterprise which it identifies. As long as the system of operation of the franchisees lives up to those quality standards and remains as represented by the mark so that the public is not misled, neither the protection afforded the trade-mark by law nor the value of the trade-mark to the licensee depends upon the source of the components.

This being so, it is apparent that the goodwill of the Chicken Delight trade-mark does not attach to the multitude of separate articles used in the operation of the licensed system or in the production of its end product. It is not what is used, but how it is used and what results that have given the system and its end product their entitlement to trade-mark protection. It is to the system and the end product that the public looks with the confidence that established goodwill has created.

Thus, sale of a franchise license, with the attendant rights to operate a business in the prescribed manner and to benefit from the goodwill of the trade name, in no way requires the forced sale by the franchisor of some or all of the component articles. Just as the quality of a copyright creation cannot by a tie-in be

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[6] *See generally*, Baker, "Another Look at Franchise Tie-ins after Texaco and Fortner," 14 Antitrust Bull. 767 (1969); FTC, "Report of Ad Hoc Committee on Franchising," 18-25 (June 2, 1969); Le Blanc, "Antitrust Ramifications of Trademark Licensing and Franchising," 53 Trademark Rep. 519, 537 (1963).

appropriated by a creation to which the copyright does not relate, United States v. Paramount Pictures, Inc., 334 U.S. 131, 158, 68 S.Ct. 915, 92 L.Ed. 1260 (1948), so here attempts by tie-in to extend the trademark protection to common articles (which the public does not and has no reason to connect with the trademark) simply because they are said to be essential to production of that which is the subject of the trade-mark, cannot escape antitrust scrutiny.

Chicken Delight's assertions that only a few essential items were involved in the arrangement does not give us cause to reach a different conclusion. The relevant question is not whether the items are essential to the franchise, but whether it is essential to the franchise that the items be purchased from Chicken Delight. This raises not the issue of whether there is a tie-in but rather the issue of whether the tie-in is justifiable, a subject to be discussed below.

We conclude that the District Court was not in error in ruling as matter of law that the arrangement involved distinct tying and tied products.

B. *Economic Power*

Under the per se theory of illegality, plaintiffs are required to establish not only the existence of a tying arrangement but also that the tying product possesses sufficient economic power to appreciably restrain free competition in the tied product markets. Northern Pacific R. Co. v. United States, *supra*.

Chicken Delight points out that while it was an early pioneer in the fast food franchising field, the

record establishes that there has recently been a dramatic expansion in this area, with the advent of numerous firms, including many chicken franchising systems, all competing vigorously with each other. Under the circumstances, it contends that the existence of the requisite market dominance remained a jury question.

The District Court ruled, however, that Chicken Delight's unique registered trade-mark, in combination with its demonstrated power to impose a tie-in, established as matter of law the existence of sufficient market power to bring the case within the Sherman Act.

We agree. In Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502-503, 89 S.Ct. 1252, 1258, 22 L.Ed.2d 495, (1969), it is stated:

> "The standard of 'sufficient economic power' does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market."

Later, at page 504, 89 S.Ct. at page 1259, it is stated:

> "Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."

In United States v. Loew's, Inc., 371 U.S. 38, 45, 83 S.Ct. 97, 102, 9 L.Ed.2d 11 (1962), it is stated:

> "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

It can hardly be denied that the Chicken Delight trade-mark is distinctive; that it possesses goodwill and public acceptance unique to it and not enjoyed by other fast food chains.

It is now clear that sufficient economic power is to be presumed where the tying product is patented or copyrighted. United States v. Loew's, Inc., *supra;* United States v. Paramount Pictures, Inc., *supra;* International Salt Co. v. United States, *supra.*

In *Fortner, supra,* 394 U.S. at page 505, note 2, 89 S.Ct. at page 1259, it is stated:

> "Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, *e.g., International Salt; Loew's,* or physical, as when the product is land, *e.g., Northern Pacific.*"

Just as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trade-mark presents a legal barrier against competition. It is not the nature of the public interest that has caused the legal barrier to be erected that is the basis for the presumption, but the fact that such a barrier does exist. Accord-

ingly we see no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trade-mark.[7]

Thus we conclude that the District Court did not err in ruling as matter of law that the tying product —the license to use the Chicken Delight trade-mark— possessed sufficient market power to bring the case within the Sherman Act.

C. *Justification*

Chicken Delight maintains that, even if its contractual arrangements are held to constitute a tying arrangement, it was not an unreasonable restraint under the Sherman Act. Three different bases for justification are urged.

First, Chicken Delight contends that the arrangement was a reasonable device for measuring and collecting revenue. There is no authority for justifying a tying arrangement on this ground. Unquestionably, there exist feasible alternative methods of compensation for the franchise licenses, including royalties based on sales volume or fees computed per unit of time, which would neither involve tie-ins nor have undesirable anticompetitive consequences.[8]

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[7] Our conclusion conflicts with that of the majority of the *Susser* case, *supra*, 332 F.2d at 518-521, which, after a careful review of the facts in that case, held that sufficient economic power had not been demonstrated. But the *Susser* court understood the economic power test to require a showing of "market dominance." We think that interpretation has since been rejected by the Supreme Court in Fortner Enterprises, Inc. v. United States Steel Corp., *supra*.

[8] It bears noting that Chicken Delight's competitors in the fast food franchising business did not find it necessary to use tie-ins.

Second, Chicken Delight advances as justification the fact that when it first entered the fast food field in 1952 it was a new business and was then entitled to the protection afforded by United States v. Jerrold Electronics Corp., *supra*, 187 F.Supp. 545. As to the period here involved—1963 to 1970—it contends that transition to a different arrangement would be difficult if not economically impossible.

We find no merit in this contention. Whatever claim Chicken Delight might have had to a new business defense in 1952—a question we need not decide—the defense cannot apply to the 1963-70 period. To accept Chicken Delight's argument would convert the new business justification into a perpetual license to operate in restraint of trade. *See* Id., 187 F.Supp. at 558, 561.

The third justification Chicken Delight offers is the "marketing identity" purpose, the franchisor's preservation of the distinctiveness, uniformity and quality of its product.

In the case of a trade-mark this purpose cannot be lightly dismissed. Not only protection of the franchisor's goodwill is involved. The licensor owes an affirmative duty to the public to assure that in the hands of his licensee the trade-mark continues to represent that which it purports to represent. For a licensor, through relaxation of quality control, to permit inferior products to be presented to the public under his licensed mark might well constitute a misuse of the mark. 15 U.S.C. §§ 1055, 1127; *See* Note,

"Quality Control and the Antitrust Laws in Trademark Licensing," *supra*.

However, to recognize that such a duty exists is not to say that every means of meeting it is justified. Restraint of trade can be justified only in the absence of less restrictive alternatives. In cases such as this, where the alternative of specification is available,[9] the language used in Standard Oil Co. v. United States, *supra*, 337 U.S. at 306, 69 S.Ct. at 1058, 93 L.Ed. 1371, in our view states the proper test, applicable in the case of trade-marks as well as in other cases:

> "* * * the protection of the good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. * * * The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied." *Accord,* International Business Machines Corp. v. United States, 298 U.S. 131, 138-140, 56 S.Ct. 701, 80 L.Ed. 1085 (1936).

The District Court found factual issues to exist as to whether effective quality control could be achieved by specification in the case of the cooking machinery and the dip and spice mixes. These questions were given to the jury under instructions; and the jury, in

[9] There may, of course, be cases where some extraordinary condition forecloses specification, *e. g.*, where it would divulge a trade secret.

response to special interrogatories, found against Chicken Delight.[10]

As to the paper packaging, the court ruled as matter of law that no justification existed. It stated, 311 F.Supp. at page 851:

> "Defendants' showing on paper packaging is nothing more than a recitation of the need for distinctive packaging to be used uniformly by all franchisees in identifying the hot foods. This was not contested. However, the admissions in evidence clearly demonstrate that the tied packaging was easily specifiable. In fact, the only specifications required were printing and color. Moreover, defendants have admitted that any competent manufacturer of like products could consistently and satisfactorily manufacture the packaging products if defendants furnished specifications. Those suppliers could have sold to the franchisees through normal channels of distribution."

We agree. One cannot immunize a tie-in from the antitrust laws by simply stamping a trade-mark symbol on the tied product—at least where the tied product is not itself the product represented by the mark.

We conclude that the District Court was not in error in holding as matter of law (and upon the limited jury verdict) that Chicken Delight's contractual requirements constituted a tying arrangement

[10]Chicken Delight asserts error in the instructions given. In our view, however, the essential question—whether specification under the circumstances was practicable—was properly presented to the jury.

in violation of § 1 of the Sherman Act. Upon this aspect of the case, judgment is affirmed.

III. THE MEASURE OF DAMAGES

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that anyone "injured in his business or property" by reason of a violation of the antitrust laws "shall recover threefold the damages by him sustained." In determining what damages plaintiffs incurred, the District Court noted that the contracts and all written representations by Chicken Delight stated that there were no franchise fees or royalty payments and from that fact concluded that the entire price paid by the franchisees was allocable to the tied items. Thus, the court ruled that the fact of damages equal in amount to the overcharge on the tied items (the amount by which the contract price exceeded the market price for comparable items) was established as a matter of law.

It stated, 311 F.Supp. at page 852:

> "On the issue of fact of damage, this Court has determined as a matter of law that the fact of damage is established. Defense counsel persists in his argument that the upcharge in the tied product should be offset by a 'reasonable value' assessed for the Chicken Delight license. * * * This Court will not attempt to restructure the system of defendants into one which is legally constituted and then allow an offset for imaginary or suppositious royalty fees. Such would be directly contrary to the avowed policy of the Sherman Act."

In this we feel the court erred.

It is by no means clear that any of the parties to the tying arrangements understood that the tying items were to be given free of charge. Indeed, the more reasonable reading of the contracts and of Chicken Delight's representations is that they stated simply that the contract prices for the tied items were to be the full compensation asked by Chicken Delight for both those items and the franchise licenses.

By its own terms, Clayton Act recovery is available only where actual injury has been suffered. Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., 346 F.2d 1012, 1014 (9th Cir. 1965). The question here is whether the plaintiffs have suffered injury by virtue of the unlawful arrangement to which they were subjected. That arrangement of necessity involved both tying and tied products. To ascertain whether an unlawful arrangement for the sale of products has caused injury to the purchaser, the cost or value of the product involved, free from the unlawful arrangement, must first be ascertained. *Cf.*, Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 140, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

Appellants contend that since the value of the tying items must be taken into account, as matter of law appellees have suffered no injury. They reason that the value of the tying items has been conclusively evidenced by what the frarchisees were willing to pay

(in overcharges for the tied items) in order to get them.

We cannot agree.[11] The franchisees' apparent willingness to pay the ultimate cost of the arrangement is clouded by the fact that they may well have been unaware of what that cost would come to in practice. Had the full amount of the over-charge on the tied items been openly specified as the cost of the tying items, agreement might not have been forthcoming. We can hardly rule as matter of law that it would have been.

We conclude that neither the existence of damage nor its lack of existence has been established as matter of law; that factual issues remain as to the value of both tying and tied products, free from the tying arrangement; that remand for the resolution of these issues is necessary.

Upon the issue of damages, judgment is reversed and the case remanded for limited new trial.

IV. THE PETITION FOR MANDAMUS

Chicken Delight moved in the District Court for a partial summary judgment granting a declaration that, in the event its franchise arrangements are found to be unlawful, they are voidable and terminable by

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[11] Were appellant's position correct, there could never be treble damage recovery by tie-in purchasers, since damage could never be demonstrated. This broad principle has already been rejected by this court, which has recognized the right of purchasers under illegal tying arrangements to collect treble damages for overcharges. *See* Lessig v. Tidewater Oil Co., 327 F.2d 459, 471-472 (9th Cir. 1964); *see also* Osborn v. Sinclair Refining Company, 324 F.2d 566, 570 (4th Cir. 1963).

Chicken Delight. The court denied both that motion and Chicken Delight's request for an order authorizing an interlocutory appeal of the question. Chicken Delight now petitions this court for a writ of mandamus commanding the District Court to declare the franchise contracts terminable at Chicken Delight's option.

The theory advanced by Chicken Delight is that, if the franchise contracts are unlawful and thus not enforceable against the franchisees, there would be a failure of mutuality and consideration which should preclude enforcement by the franchisees. In more practical terms, Chicken Delight's concern is that the District Court's decision might entitle the plaintiffs to a royalty-free franchise license in the future.

Mandamus is an extraordinary remedy, the issuance of which is discretionary. *See, e. g.,* Will v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 19 L.Ed. 2d 305 (1967); Whitehouse v. Ill. Cent. R. Co., 349 U.S. 366, 373, 75 S.Ct. 845, 99 L.Ed. 1155 (1955). Without reaching the question of whether the illegal franchise arrangements should be terminable at Chicken Delight's option, we decline to issue the writ at this time.

Both the appeal and the petition are interlocutory. The issues involved may become more clear after the case is completely settled in the District Court. (It may even be that Chicken Delight will not desire review of the District Court's disposition at that point.) Since the District Court's theory of damages and its refusal to allocate any of the purchase price to the tying product has been reversed, the factual

background of the issue raised in the petition is already quite different from that anticipated when the petition was filed. Chicken Delight's interests can be adequately protected by an appeal at the end of the District Court's proceedings.

Writ denied.

No costs are awarded.

Appendix B

United States District Court
N.D. California

Civil No. 46271-GBH

Harvey Siegel and Elaine Siegel, husband and wife, et al.,
Plaintiffs,

vs.

Chicken Delight, Inc., et al.,
Defendants,

Vance E. Shepherd and Ben Zachary, a partnership, et al.,
Intervening Plaintiffs.

Chicken Delight, Inc., et al.,
Cross-Claimants,

vs.

Harvey Siegel, et al.,
Cross-Defendants.

April 6, 1970.
Supplemental Memorandum
April 10, 1970.

MEMORANDUM OPINION AND ORDER ON MOTION FOR DIRECTED VERDICT

GEORGE B. HARRIS, Chief Judge.

This matter is before the Court on plaintiffs' motion for a directed verdict following the close of defend-

ants' case and the submission of the evidence. The Court being fully advised and having considered all of the testimony and evidence, including the numerous and lengthy oral arguments of counsel, all of the briefs, depositions and affidavits, has now reached the following decision and opinion.*

The issues, simply stated, are: (1) Are the defendants' standard contract and practices requiring the purchase of various packaging items, cookers and fryers, and certain mix preparations for food a tying agreement in violation of Section 1 of the Sherman Act? (2) If so, have the plaintiffs been injured by the said violation?

Tying arrangements, by definition agreements in which the seller offers two separate items for sale but will not sell the first item (or tying item) unless the buyer agrees to purchase the second item (or tied item), have uniformly been treated harshly by the United States Supreme Court. International Business Machines v. United States, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936); International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); United States v. Loew's, Inc., 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed. 2d 11 (1962); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); Fortner Enterprises v. United States

*Earlier opinions regarding the propriety of the class action: Siegel v. Chicken Delight, Inc., 271 F.Supp. 722 (N.D.Cal. 1967); Chicken Delight, Inc. v. Harris, District Judge, 412 F.2d 830 (9th Cir. 1969).

Steel, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969). The instant case is conceptually an illustration of the classical tie. Defense counsel argues that this case involves a single product, "the Chicken Delight System," thus attempting to come within the single product ruling of Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), wherein the traditional statement of the *per se* rule against tying arrangements was first enunciated by Mr. Justice Clark.

However, the case of Susser v. Carvel Corp., 332 F. 2d 505 (2nd Cir., 1964), which is factually most akin to this litigation, clearly holds contra. Both the majority and the dissent in Susser recognize that a trademark license which is granted on the condition that the licensee purchase other products can clearly be a "tying item" within the meaning of the above cases. This Court is in full accord with such a finding. In the economic context of present franchising trends, it is clear that a franchise license is marketable separate and apart from the various products which the franchisees are required to purchase from and through the franchisor.

In the case at bar, it is manifest that the license to use the Chicken Delight name, trademark and method of operations was a tying item in the traditional sense. The tied items were the required paper packaging products, the cookers and fryers and the food preparation mixes. Thus, for purposes of the Sherman Act, this Court finds as a matter of law that a tying agreement exists.

With respect to the essential ingredient of market control, the cases dictate but one conclusion—that as a matter of law Chicken Delight's admittedly unique, registered trademark combined with its power to impose the tie-in demonstrates the existence of sufficient market power to bring the case within the Sherman Act. A review of Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1957); United States v. Loew's, Inc., 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962); Fortner Enterprises v. United States Steel, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969) and Advanced Business Systems & Supply Co. v. SMC Corp., 415 F.2d 55 (4th Cir., 1969) demands this result. To enmesh the jury in the rubric of market power in light of the clear guidelines laid down in the above cases should be unnecessary. This Court clearly may and does rule upon this question as a matter of law.

The *Northern Pacific Ry.* case gave the first indication that market power is evidenced by the fact of the tie-in. *"The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power* * * *." 356 U.S. at pp. 7-8, 78 S.Ct. at p. 519.

The *Loew's* case likewise strongly indicated that market power can be inferred from the existence of the tie-in.

> They [tying agreements] are an object of antitrust concern for two reasons—they may force buyers into giving up the purchase of substitutes for the tied product * * * and they may destroy

> the free access of competing suppliers of the tied product to the consuming market * * *. A tie-in contract may have one or both of these undesirable effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item. * * * Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. (citations omitted). 371 U.S. at pp. 44-45, 83 S.Ct. at p. 102.

In a footnote to the above quote, Mr. Justice Goldberg stated that "it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product * * *" Where the tying item is the subject of a patent or a copyright, sufficient market power is presumed.

In *Fortner,* Mr. Justice Black further narrowed the scope of inquiry into market power. "Accordingly, the proper focus of [market power] concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." 394 U.S. at p. 504, 89 S.Ct. at p. 1259.

Subsequently, citing *Fortner,* the Fourth Circuit in *Advanced Business Systems* held that "a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product." 415

F.2d at p. 62. Although this statement was made with regard to a violation of the Clayton Act, this Court is of the opinion that any distinction between the Sherman Act and Clayton Act with regard to the question of market power is wholly artificial. See, Handler, "Antitrust: 1969," 55 Cornell L.Rev. 161, 171 (1970).

For purposes of the Sherman Act, the effect on interstate commerce need merely be said to be "not insubstantial." International Salt Co. v. United States, 332 U.S. 392, 396, 68 S.Ct. 12, 92 L.Ed. 20 (1947). This test is fulfilled if the dollar amount is not *de minimis* or not "paltry." Fortner Enterprises v. United States Steel, 394 U.S. 495, 501-502, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969). In the present case (millions of dollars being involved), the dollar amount cannot be said to be *de minimis*. Thus, as a matter of law, this Court finds that the interstate commerce affected is "not insubstantial." A *per se* violation of the Sherman Act is therefore found to exist.

When a *per se* violation of the Sherman Act exists, the areas of justification for a tie-in are indeed narrow. See, Baker, "Another Look at Franchise Tie-ins After *Texaco* and *Fortner*," 14 Antitrust Bulletin 767, 778 et seq. (1969). In this litigation, defendants propound four so-called justifications for the tie-in of the various required products. They are: (1) Quality control for protection of trademark good will; (2) New business justification; (3) A convenient accounting device for compensation of the trademark license; and (4) Franchisor's assurance of initial equipment and a continuing source of supply of essential items.

In the factual structure and posture of this case, the Court rules as a matter of law that the latter two asserted justifications cannot and do not justify so onerous an anti-competitive device as the tie-in agreement herein condemned.

Use of a tie-in cannot be justified as an accounting device for compensation for a trademark license. The defendants cite no relevant authority for such a proposition. In fact, such a justification is contrary to the uncontradicted evidence in this case, which evidence shows that the defendants charged no franchise fee or continuing royalty. Furthermore, an accounting method which specified a percentage of gross from the franchisees is just as convenient and has none of the anti-competitive effects of a tie-in.

Defendants' fourth attempted justification insists that they had a legal duty to assure franchisees of initial equipment and continuing supplies of other essential items. The admissions and the evidence are replete that defendants' alleged obligations could easily have been fulfilled without tying the purchase of those items to a trademark license. Defendants, like most franchisors, could have designated manufacturers and distributors who are available throughout the United States and anxious to do business as those sources of supply. This Court rules as a matter of law that such a justification is not available or defensive to the *per se* tying arrangement in this case.

In United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 559 (E.D.Pa., 1960), aff'd per curiam 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961), the

Supreme Court recognized the so-called new business justification. In *Jerrold* the sole restraint approved by the Court was the tie-in of an engineering service contract for highly complex equipment, during the early stages of a business whose technology was advanced and unproven. As technological knowledge became more widespread and definitive, the Court indicated that the restraint could no longer be justified. This defense can certainly be held, as a matter of law, not to apply to the case at bar. The undisputed facts are that defendants started their business in 1952 and, for the period 1963 through 1969 and into 1970 (the period relevant to this litigation), the purchase requirements, although expanded in the number of products required, prevailed unchanged.

The defendants further assert that the tie-in of the paper products, the dip and spice mixes and the cookers and fryers can be justified as necessary quality control to protect the good will of their trademark. Heavy reliance is placed upon the opinion of Mr. Justice Friendly in the *Susser* case, supra. The Court agrees that this defense has sufficient vitality, as a factual consideration, to reach the jury as to the dip and spice mixes and as to the cookers and fryers. However, the Court rules as a matter of law that there can be no justification for the tie-in of the paper products.

The guiding language on the issue of quality control justification was stated by Mr. Justice Frankfurter in Standard Oil Co. of Cal. and Standard Stations v. United States, 337 U.S. 293, 305-306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371 (1948).

> Tying agreements serve hardly any purpose beyond the suppression of competition. The justification most often advanced in their defense—the protection of good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. *The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practically be supplied.* (emphasis supplied)

This language is fatal to defendants' contention as to quality control justification for the tied paper products.

Defendants' showing on paper packaging is nothing more than a recitation of the need for distinctive packaging to be used uniformly by all franchisees in identifying the hot foods. This was not contested. However, the admissions in evidence clearly demonstrate that the tied packaging was easily specifiable. In fact, the only specifications required were printing and color. Moreover, defendants have admitted that any competent manufacturer of like products could consistently and satisfactorily manufacture the packaging products if defendants furnished specifications. Those suppliers could have sold to the franchisees through normal channels of distribution. As a matter of law, therefore, this paper products tie-in cannot be justified on any grounds within the contemplation of acceptable authority.

The *Susser* case, on the other hand, does indicate that where quality of food is a consideration the quality control defense is relevant to the issue of justification of a tie-in. In this regard, Mr. Justice Friendly stated:

> Although instances of impossibility of control through specification may indeed be rare in cases involving the proper functioning of mechanical elements of a machine * * * such cases are scarcely relevant to the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae; that Carvel was able to specify this to its source of supply, whose product it regularly checked, does not show that administration could be confided to 400 dealers. 332 F.2d at 520.

Such considerations are relevant to the asserted defense of Chicken Delight. The dip and spice mixes are alleged to be *secret* and to impart a unique and distinctive flavor to the final products. Likewise, the cooker is alleged to be unique and to prepare the food in a special manner. Contradictory testimony has been offered on this aspect of the litigation. As such, a question of fact exists for the jury to determine.

On the issue of fact of damage, this Court has determined as a matter of law that the fact of damage is established. Defense counsel persists in his argument that the upcharge in the tied products should be offset by a "reasonable value" assessed for the Chicken Delight license. The Court has ruled that this evidence of valuation is not relevant. The system was sold to the franchisees on a specific basis and the evidence is complete, reflects and memorializes the bases

upon which the transactions were consummated with the franchisees. The contract and all written representations by the company stated that there were no franchise fees or royalty payments. This Court will not attempt to restructure the system of defendants into one which is legally constituted and then allow an offset for imaginary or suppositious royalty fees. Such would be directly contrary to the avowed policy of the Sherman Act.

Without an offset for the supposed value of the Chicken Delight trademark, the overcharge on the tied items is established. As a matter of law therefore, the Court finds the fact of damage.

To summarize, the Court finds as a matter of law that there is an unlawful tie-in arrangement; that sufficient market control exists; that a "not insubstantial" amount of interstate commerce is affected; that no justification exists with respect to the continuity of supply of paper products; that neither the alleged justifications of convenient accounting device nor continuing source of supply are defenses in this litigation; that the new business justification is clearly inapplicable to this case; and that the fact of damages is established.

The Court rules that the jury may consider the asserted quality control justification as to the dip and spice mixes and cookers and fryers under appropriate instructions.

To the extent consistent with the above decision and opinion, plaintiffs' motion for directed verdict must be, and the same is hereby, granted.

Defendants' motion for directed verdict must be and the same is hereby denied.

SUPPLEMENTAL MEMORANDUM

Thereafter and on April 10, 1970, the jury, after oral arguments on behalf of the respective parties and instructions as to the law by the Court, regularly returned the following special verdicts with respect to the several issues tendered, under the defendants' theory of alleged justification on the part of the defendants:

JUSTIFICATION ISSUE—DIP AND SPICE MIX

Special Verdict 2A

We the jury find that requiring franchisees to purchase dip and spice mix solely from Chicken Delight has not been legally justified under instructions given by the Court.

/s/ N. J. Davis
Jury Foreman

JUSTIFICATION ISSUE—COOKERS AND FRYERS

Special Verdict 3A

We the jury find that requiring franchisees to purchase cookers and fryers solely from Chicken Delight has not been legally justified under instructions given by the Court.

In addition, under the Court's order and direction, the following Special Verdict No. 1 was regularly returned by said jury:

DIRECTED VERDICT ON CERTAIN ISSUES
Special Verdict No. 1

We, the jury, pursuant to direction and instruction from the Court find (1) that the arrangement requiring Chicken Delight franchisees to purchase their full requirements of packaging goods, dip and spice mix, and cookers and fryers from their franchisor is a tying arrangement, (2) that Chicken Delight, by reason of its unique, registered trademarks, possessed sufficient economic power to induce its franchisees to buy the tied products, (3) that a not insubstantial dollar volume of interstate commerce in the tied products has been adversely affected, (4) there is no legal justification for the tie-in of packaging products and it is therefore unlawful, and (5) plaintiffs and members of the class have been damaged as a result of being required to purchase their full requirements of packaging goods, dip and spice mix and cookers and fryers.

/s/ N. J. Davis
Jury Foreman

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Appendix C

AGREEMENT

THIS AGREEMENT, made and entered into this 22 day of March, A. D. 196 5 by and between CHICKEN DELIGHT OF CALIFORNIA, INC., a California corporation, and _____, hereinafter sometimes collectively referred to as first party, and Harvey & Elaine Siegel / as joint tenants with right of survivorship, of the City of Walnut Creek, State of California, hereinafter sometimes referred to as second party.

WHEREAS, there is a substantial and increasing public demand for hot, freshly prepared and uniform food products, carried out by the consumer or delivered to the consumer in a state for immediate consumption at times and places convenient to the consumer, and Chicken Delight, Inc., is the originator of special preparations, packaging, methods and systems of operation useful in the efficient preparation, sale and delivery of such food products; and

WHEREAS, "Chicken Delight" and other trademarks associated therewith are valuable properties for identifying to the public certain hot, freshly prepared food products, some of which are prepared with certain unique equipment, and all of which are packaged in and include certain distinctive products, and prepared, sold and delivered as prescribed by Chicken Delight, Inc.; and

WHEREAS, Chicken Delight of California, Inc. is an independent sales representative for the "Chicken Delight" franchise rights to the market hereinbelow described and has recommended the selection of second party to enjoy such rights in such market; and

WHEREAS, second party is desirous of engaging in the business of the preparation and sale of hot, freshly prepared packaged foods as hereinbelow described, and represents that he is willing to conduct such business so as to deliver to the public the products and services identified to the public by "Chicken Delight" and other trademarks associated therewith;

NOW, THEREFORE, in consideration of the covenants herein contained and of further valuable consideration, the parties hereto do hereby agree as follows:

1. Chicken Delight of California, Inc. hereby licenses to second party, during the term and upon the conditions hereinafter set forth, the right and franchise to use the names, symbols, method, and system of operation of "Chicken Delight", from a store situated at 2146 Center Street, in the City of ~~XXXXXXXX~~ Berkeley, County of Alameda, and State of California, and within the adjacent market bounded by _____ that part of Berkeley, per attached map

Second party acknowledges that it is an essential element of the public understanding of the meaning of "Chicken Delight" that hot, freshly prepared and uniform foods from a "Chicken Delight" store will be delivered promptly and at the time designated by the customer; and second party represents and agrees that the aforesaid description of the franchised market constitutes the reasonable boundaries of an area within which such prompt and timely delivery may be accomplished and that he will make such prompt and timely delivery of such hot, freshly prepared food in all of said market. Second party acknowledges that heretofore he has not been engaged in the sale of carry-out food products. Chicken Delight of California, Inc. agrees to disclose to and instruct second party as to special preparations, packaging, methods

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and systems of operation in the sale of said packaged foods, which second party acknowledges constitute trade secrets, and he agrees not to disclose them to anyone except his "Chicken Delight" store employees, and not to use them except in his "Chicken Delight" business. Second party agrees that he will not divulge any business information, whether written or oral, received from first party or its authorized representative, or from any meetings of "Chicken Delight" store owners, nor use such information except in his "Chicken Delight" business, until such time as disclosure to the public may be required by the nature of the information, which information includes (but is not limited to) promotional material or plans, expansion plans, new products, marketing information, cost or other financial data, or development of cooking or packaging procedures. Second party agrees that he shall use only the name "Chicken Delight" and the trademarks associated therewith in the sale of said packaged foods and that his place of business for such sale shall be known only as "Chicken Delight." Second party agrees that no food shall be sold for consumption on his premises.

2. Said packaged foods shall consist of, and be limited to, the following, all of which shall be sold and delivered hot and freshly prepared except for cole slaw:

(a) Chicken dinner — one-half of what is known in the poultry trade as an average 2½-2½ pound dressed and drawn Grade A frying chicken (weighing one pound fifteen ounces to two pounds one ounce without giblets and neck), cut into four pieces according to specifications of Chicken Delight, Inc., prepared, processed, and cooked in conformity with the method of Chicken Delight, Inc.; a generous portion of crinkle-cut French fried potatoes; a blueberry muffin; and a fully enclosed container of cranberry sauce or an approved substitute.

(b) Shrimp dinner — eight of what is known in the shrimp trade as 26/30 count raw shrimp, breaded to 15/20 count, Grade A U.S.D.I., obtained from the Gulf of Mexico, frozen but once, and prepared, processed and cooked in conformity with the method of Chicken Delight, Inc.; a generous portion of crinkle-cut French fried potatoes; a blueberry muffin; a fully enclosed container of cocktail sauce; and a package of mints.

(c) Fish dinner — eight ounces of what are known in the fish trade as fish fillets, prepared, processed and cooked in conformity with the method of Chicken Delight, Inc.; a generous portion of crinkle-cut French fried potatoes; a blueberry muffin; and a fully enclosed container of tartar sauce.

(d) Rib dinner — twelve ounce cooked weight portion of pork loin back ribs (and not spareribs) which are described in the meat trade as a one and one-quarter pound to one and three-quarters pound size, prepared, processed, and cooked in conformity with the method of Chicken Delight, Inc.; a generous portion of crinkle-cut French fried potatoes; a blueberry muffin; and a fully enclosed container of barbecue sauce.

(e) Chicken snack (99'er) — same as chicken dinner, except that the chicken shall consist of a wing and a breast or a thigh and a drumstick.

(f) Shrimp snack (99'er) — same as shrimp dinner, except that there shall be but five shrimp and there shall be no muffin.

(g) Fish snack (99'er) — same as fish dinner, except that there shall be but four ounces of fish fillets and there shall be no muffin.

(h) Rib snack (99'er) — same as rib dinner, except that there shall be but eight ounces of ribs and there shall be no muffin.

(i) Bucket O'Chicken — bulk orders of chicken, shrimp, fish or ribs, as hereinabove described.

(j) Pizza pie — in 9", 12" and 16" sizes, prepared, processed and baked in conformity with the method of Chicken Delight, Inc.

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(k) Cole slaw — prepared and processed in conformity with the method of Chicken Delight, Inc.

(l) Crinkle-cut French fried potatoes prepared, processed and cooked in conformity with the method of Chicken Delight, Inc.

(m) Blueberry muffin.

In the event that items other than those hereinabove specified are approved by Chicken Delight, Inc. for standard use in other "Chicken Delight" businesses, Chicken Delight of California, Inc. will grant second party permission to sell such other items upon the terms and conditions herein contained.

3. Second party is specifically granted the right and privilege to sell food or other products other than those herein specified, provided they are prepared at or sold from an entirely separate store, identified by a different trade name, and if delivered, delivered from a vehicle bearing no trademark of first party. Second party agrees not to use the "Chicken Delight" premises or trademarks for the sale of any products other than said "Chicken Delight" food products hereinabove described or in conjunction with or on the same premises with any other business or occupation.

4. The price to be charged to patrons by second party for any and all such products, whether or not specified herein, or any combination thereof, shall be determined in the sole discretion of second party.

5. Chicken, shrimp, fish, ribs, pizza, and potatoes shall be cooked in plain view of patrons, and wherever possible, in plain view of passers-by on the exterior of said place of business. Second party agrees to use only fresh, refrigerated chicken and not to use preserved chicken, such as canned, frozen, or cold storage chicken. Second party agrees that he will not pre-cook chicken, shrimp, fish, or pizza in anticipation of orders not yet placed but will cook from a raw state as each order is placed. No frozen pizza crust, or frozen or pre-baked pizza pie shall be used. Such foods as may be frozen shall be frozen but once.

6. In order to enable second party to engage in the business of preparation, sale and delivery of hot, freshly prepared foods in accordance with the public understanding of "Chicken Delight" and associated trademarks, Chicken Delight of California, Inc. will furnish, and second party agrees to buy, certain unique and distinctive articles essential in the conduct of the business; and in addition such other articles, also essential in the conduct of such business, as second party has indicated a desire to purchase from Chicken Delight of California, Inc. all as indicated on the list attached hereto and made a part hereof.

The purchase price of such articles is the sum of $ XXXXXXX, payable in cash in advance of shipment, of which it is acknowledged that the price of the cookers and fryers is the sum of $ XXXXXXXXXX. Second party has determined not to buy from Chicken Delight of California, Inc. the articles which have been deleted from the printed form of list attached hereto. As such articles as have been deleted are, in the opinion of Chicken Delight of California, Inc., essential for the efficient conduct of the business described herein in accordance with the public understanding of "Chicken Delight" and associated trademarks, second party agrees to obtain at his expense and for use in his business, all such articles, meeting the reasonable standards of Chicken Delight, Inc., from any source desired.

7. Chicken Delight of California, Inc. represents and warrants that it has no financial arrangement with second party's suppliers, whether by rebate or otherwise in the purchase of chicken, shrimp, fish, ribs, potatoes, or shortening, and second party is at liberty to purchase such items from any source whatsoever provided, however, that such items meet the reasonable standards of Chicken Delight of California, Inc.

8. Second party recognizes the importance of furnishing products prepared in conformity with the method of Chicken Delight, Inc. in distinctive packaging, identified by "Chicken Delight" or other associated trademarks. Second party agrees to sell each said food product in an individual enclosed paper or plastic container bearing the standard identification and trademark of "Chicken Delight". Chicken De-

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light of California, Inc. agrees to sell or make available to second party, and second party agrees to buy solely from Chicken Delight of California, Inc. or such other person or corporation as may be designated by it, the requirements of second party for dinner kits (consisting of a dinner size container, spoon, napkin, and cranberry sauce or equivalent), snack kits (consisting of a snack size container, and package of mints), large buckets (being known in the trade as a ten-pound pail), medium buckets (being known in the trade as a five-pound pail), small buckets (being known in the trade as a two-pound pail), pizza kits (consisting of a carton and a corrugated liner), and other distinctive packaging, all from time to time authorized by Chicken Delight, Inc. and bearing one or more of its trademarks. The prices therefor will be 16 cents for dinner kits, 12 cents for snack kits, 26 cents for large buckets, 21 cents for medium buckets, 15 cents for small buckets, 16 cents for 9" pizza kits, 19 cents for 12" pizza kits, and 27 cents for 16" pizza kits, from the date hereof to December 31, 1965, and from time to time thereafter will be no greater than ten (10) per cent more than the price in any previous six months' period. In the event of any increase in price, the new price shall not exceed the price stated herein by a percentage greater than the percentage increase in cost of Chicken Delight of California, Inc., and upon request Chicken Delight of California, Inc. will furnish second party with a statement from its independent certified public accountants that it does not. Purchases will be made in minimum quantities of five thousand (5,000) units and according to the requirements of second party for packaging. Second party agrees to buy from Chicken Delight of California, Inc., the special "Chicken Delight" batter preparation, the special "Chicken Delight" barbecue rib seasoning, and the "Chicken Delight" cole slaw cups, lids, French fry bags and carry out bags for reasonable prices, and that he will not use substitutes thereof in his "Chicken Delight" business.

9. Second party recognizes the importance of publicizing the "Chicken Delight" and other associated trademarks by all reasonable means. Chicken Delight of California, Inc. agrees to spend three (3) cents per kit or bucket for advertising and promoting "Chicken Delight" products.

10. All of the equipment and supplies of every nature sold and to be sold hereunder are quoted F.O.B. shipping point and for cash in advance of shipment.

11. Second party agrees that said business shall be conducted and operated only at a location within said market area approved by first and second parties, and that the construction or remodeling of his premises shall meet the reasonable standards of first party. Second party agrees that construction or remodeling of his premises will be commenced within thirty (30) days after the execution of this agreement, and that said construction or remodeling will be thereafter diligently pursued to completion and opening of said "Chicken Delight" business within a reasonable time. First party agrees to furnish an installation manual, including plans and specifications.

12. First party agrees to furnish an operational manual, and from time to time promotional and other recommendations. First party agrees to make personnel training facilities available to second party, and to furnish to second party at his place of business a trained superviser for not less than five (5) days.

13. Second party agrees to purchase chicken, shrimp, fish, ribs, potatoes, muffins, and all other foods and materials only of a uniform and high quality. Chicken Delight of California, Inc. agrees to furnish upon request information regarding sources of food supplies. Second party agrees that all foods shall be prepared and cooked at a uniform and high quality. As to food products which require preparation in shortening, second party agrees to use only all-vegetable shortening.

14. Second party agrees to purchase or lease, and to use at all times, an adequate number of delivery vehicles and to plainly mark them and his place of business with the standard trademarks of Chicken

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Delight, Inc. Second party agrees to maintain a free and adequate delivery service within the entire market herein described, and to use delivery ovens which properly preserve heat until delivery to the consumer.

15. Second party agrees to maintain the premises and equipment which are to be used in the performance of this agreement in good repair and at a high degree of cleanliness and sanitation, and to comply with the food and sanitary laws and regulations of any and all governmental units in whose jurisdiction its business is located.

16. Second party agrees to allow first party, or its authorized representative, the privilege of complete inspection of his business, both inside and out. Second party agrees to open his books and records to the inspection of first party, provided, however, that second party shall have been given reasonable advance notice and that the inspection shall not interfere with the operation of second party's business. Second party agrees to furnish to Chicken Delight of California, Inc., a prescribed weekly report of each week's business no later than one week thereafter.

17. None of the first parties hereto promise to bring or defend any law suits arising over the imitation of any business, names, or symbols, except as first party, or any of them, may in the exercise of their own discretion choose to engage in.

18. Second party acknowledges the value of free delivery, uniformity and product control of quality, appearance, and high delivery standards, and further acknowledges observance of them by him as of great value to all other operators of "Chicken Delight" businesses.

19. This agreement shall be binding upon and inure to the benefit of the successors and assigns, or to the reorganization or purchasers of first party and the heirs, administrators, executors, and assigns of the second party, provided, however, that no assignment by second party shall be valid without the prior consent in writing by Chicken Delight of California, Inc. and the entry into a new and then standard "Chicken Delight" agreement between second party's assignee and Chicken Delight of California, Inc.

20. This agreement shall continue for a period of five (5) years from the date hereof, and shall be automatically renewed for three successive five-year terms, unless, at least six months before the expiration of any five-year-term, second party gives to Chicken Delight of California, Inc. notice in writing of termination at the end of such term. Following the conclusion of the last such five-year-term, this agreement shall continue from year to year, unless terminated by either party by giving sixty (60) days' notice in writing to the other. Second party recognizes that the good will in the "Chicken Delight" and associated trademarks, for which no franchise or other such fee has been required as a condition to entering this agreement, may continue to attach to any food carry-out business conducted at the same premises as a former "Chicken Delight" franchise. It is accordingly agreed that if second party determines to exercise his right of termination prior to the end of the last such five-year-term, he will, at the time and as a condition of such exercise, offer to Chicken Delight of California, Inc. the option to acquire all or any part of the physical assets used in his business at such premises. The price for which such assets may be acquired by first party shall be the cost to the second party of the assets in question, less an allowance for depreciation of eighty-five (85) per cent.

21. In the event of a breach or threatened breach of the terms of this agreement by either party, the other party shall forthwith be entitled to an injunction restraining such other party from such breach without showing or proving any actual damage sustained. Any action for second party's breach of this agreement shall be separately maintainable by any of the first parties. It is specifically acknowledged that disclosure by second party of "Chicken Delight" special preparations, packaging, methods, systems of operation or any business information referred to in paragraph 1 hereof, to anyone except his "Chicken Delight" store employees, or use thereof by second party except in his "Chicken Delight" business, shall constitute a material breach of this agreement and shall terminate this agreement. No termi-

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nation of this agreement by first party, or of the right, title and interest of second party shall prejudice the accrued rights of first party or other rights created herein. In the event of the breach of this agreement or the termination of second party's "Chicken Delight" business for any reason, Chicken Delight of California, Inc. is hereby granted the right and option to purchase all cookers and fryers which were recommended for use in said business by first party or sold by first party, whether now or hereafter purchased or owned by second party, and the price therefor shall be the price paid by second party less an allowance for depreciation of thirty (30) per cent during the first year hereunder, fifty-five (55) per cent during the second year, seventy-five (75) per cent during the third year, and eighty-five (85) per cent at all times thereafter.

22. In the event of the breach of this agreement by second party or the termination of second party's business for any reason prior to the expiration of the last five year term provided herein, second party (and its officers, directors and shareholders) agrees:

(a) Not to engage in the business of the sale of carry out or delivered packaged foods as described herein within said market area for a period of one year following such breach or termination, whether directly or indirectly, including but without being limited to the capacities of owner, partner, shareholder, director, officer or employee.

(b) To assign any real estate lease under which he has been operating his "Chicken Delight" business.

23. In the event of the breach of this agreement by second party or the termination of second party's "Chicken Delight" business for any reason at anytime, including, but without being limited to the expiration of the last five year term provided herein, second party agrees:

(a) The license herein granted shall thereupon be terminated and second party shall immediately remove all evidence of the name and symbols of "Chicken Delight" and the other trademarks associated therewith.

(b) To relinquish the telephone numbers then assigned to his "Chicken Delight" business.

24. In the event of a sale of any existing "Chicken Delight" business, it is sometimes necessary for Chicken Delight of California, Inc., to perform various services in connection therewith, some of which may include the approval of the purchaser, approval of a new site, providing prospective purchasers, drawing new agreements, assisting in financing, furnishing promotional aids, and training the buyer. In the event of a sale of second party's "Chicken Delight" business, second party shall pay to Chicken Delight of California, Inc., a service charge of seven and one-half (7½) per cent of the sales price.

25. Neither party shall be responsible for any contingency unavoidable or beyond his or its control wherever arising, including, but without being limited to, strike, flood, riot, war, fire, rebellion, governmental limitation, and any such contingency shall excuse the inability or refusal or delay in filling or shipping orders; provided, however, nothing herein contained shall be interpreted as an excuse or defense for the failure to pay for goods.

26. The name of any corporation operating any "Chicken Delight" business may include the words "Chicken Delight" or any other trademark owned by or licensed to first party, but only with the written consent of first party. In the event of the termination of this agreement for any reason, the name of any such corporation shall be duly amended to delete such words.

27. If second party shall be adjudicated bankrupt, or shall make a general assignment for the benefit of creditors, or take benefit of any insolvent act, or if a receiver or trustee of the interest of the second party shall be appointed by a court of competent jurisdiction, or if after the opening of second party's "Chicken Delight" business it shall be closed for a period of ninety (90) days for any reason other than relocation or remodeling, or if second party shall default upon any financial obligation upon which Chick-

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en Delight of California, Inc. has undertaken any secondary financial obligation, then in any such event first party, or either of them, shall have the right, without further notice, to terminate and end this agreement, as well as all of the right, title and interest of second party hereunder, but without prejudice to the accrued rights of first party or other rights to terminate not specified in this agreement.

23. This agreement and the addenda attached hereto contain the entire agreement of the parties and no representations, inducements, promises, or agreements, oral or otherwise, not embodied herein shall be of any force or effect. No failure of first party to exercise any power given it hereunder or to insist upon strict compliance by second party of any obligation hereunder, and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of first party's right to demand strict compliance with the terms hereof.

20. The invalidity or partial invalidity of any portion of this agreement shall not invalidate the remainder of this agreement.

Executed at Los Angeles, California, the day and year first above written.

ADDENDUM

...much as the equipment for this store being purchased from La Rue H. & Sandra ...ndre, the following ... values are ...with established for the purpose of the ...ion referred to in Par... ...ph No. III:

...ers. . . . . $ ... each
A.F. Fryers. . . . . $ ... each

...ercising this op... ...CHICKEN DELIGHT CALIFORNIA, INC., ...ases to La Rue & Sandra J. Andre, of ... ...ability under ...ntract No. 03303, dated April 1, 1963, ...ch is cancelled in its entirety. La Rue ...l Sandra J. Andre herewith releases CHICKEN ...IGHT OF CALIFORNIA, INC., from the provisions ...Contract No. 03303 and relinquishes all rights ...blished by Contract No. 03303.

CHICKEN DELIGHT OF CALIFORNIA, INC.,
a California Corporation

By Frederick W Sawell (SEAL)
Its Authorized Agent
Vice President

Harvey Siegel (SEAL)

Elaine Siegel (SEAL)
Second Party
Elaine Siegel

Frederick W Sawell — 3/31/65 — La Rue H. Andre
CHICKEN DELIGHT OF CALIFORNIA, INC. — Date — La Rue H. Andre
4/5/65

Sandra J. Andre

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Appendix D

Partial List of Pending Cases Raising Issues Common to Siegel v. Chicken Delight (with date of filing indicated):

Abercrombie, et al. v. Lum's, Inc., Civil No. 295-70-A (E.D. Va., 7/17/70)

Adams, et al. v. Sawyer Business Colleges, Inc., et al., Civil No. 71-2257-ALS (C.D. Cal., 9/21/71)

All Purpose Rentals, Inc., et al. v. A to Z International, Inc., Civil No. 48-71-A (E.D. Va., 2/9/71)

Amling, et al. v. Interndtional Multifoods Corp., Civil No. C-70-637 (N.D. Ohio, 7/8/70)

Battle, et al. v. Ralston Purina Co., Civil No. 70-1878-F (C.D. Cal., 8/21/70)

Butkus, et al. v. Chicken Unlimited Enterprises, Inc., Civil No. 71-C 1607 (N.D. Ill., 7/2/71)

Campeau, et al. v. Midas, Inc., Civil No. 35163 E.D. Mich., 7/28/70)

Cokeley, et al. v. Tandy Corp., et al., Civil No. C-71-1173 (N.D. Cal., 6/16/71)

D'Amore v. The Southland Corp., Civil No. ..... (E.D. Pa. 11/12/71)

Denton, Inc. v. American Dairy Queen Corp., Civil No. 1081 (D. N.Dak., 4/26/71)

Donovan, Inc., et al. v. Lum's, Inc., Civil No. 71-C-383 (N.D. Ill., 2/10/71)

Edwards, et al. v. Dunkin Donuts of America, Inc., Civil No. 36752 (E.D. Mich., 7/2/71)

Englehardt, et al. v. Chick-n-Joy Systems, Inc., Civil No. 35759 (E.D. Mich., 12/4/70)

Elwonger v. Career Academy, Inc., Civil No. 71-C-409 (E.D. Wisc., 8/3/71)

Finch v. Master Hosts International, Inc., et al., Civil No. C-71-926 RFP (N.D. Cal. 5/14/71)

Florida Harvestore, Inc. v. A. O. Smith Harvestore Products, Inc., Civil No. 71-1070 (S.D. Fla. 7/9/71)

Ford, et al. v. Diners/Fugazy Travel, Inc., 71 Civ. 1555 (S.D.N.Y., 1971)

G & K Foods, Inc. v. Kentucky Fried Chicken, Inc., Civil No. 71-5-Civ.-Ft.M. (M.D. Fla., 3/19/71)

Halverson, et al. v. Convenient Food Mart, Inc., Civil No. 70-C-499 (N.D. Ill., 3/3/70)

House of Pancakes Franchise Litigation, In re, MDL Dkt #77 (W.D. Mo.)

Erickson v. International Industries, Inc., Civil No. 71-1874 (E.D. Pa., 7/29/71)

Fairbanks v. International Industries, Inc., Civil No. C-71-653-OJC (N.D. Cal., 4/5/71)

Harvey v. International Industries, Inc., et al., Civil No. 19281-2 (W.D. Mo., 4/12/71)

Helfenbein and Crescent Investments of Iowa, Inc. v. International Industries, Inc., et al., Civil Nos. 17281-2 and 17282-2 (W.D. Mo., 2/25/69)

Nenninger v. International Industries, Inc., Civil No. C-71-655-OJC (N.D. Cal., 4/5/71)

Reed v. International Industries, Inc., Civil No. 19231-2 (W.D. Mo. 3/25/71)

Webb v. International Industries, Inc., Civil No. C-71-654-OJC (N.D. Cal., 4/5/71)

Weth v. International Industries, Inc., Civil No. 70-2256 (E.D. Pa., 8/17/70)

Kane, et al. v. Martin Paint Stores, Inc., Civil No. ..... (S.D.N.Y., undated)

Klinzing, et al. v. Shakey's, Inc., Civil No. 69-C-344 (E.D. Wis., 7/14/69)

Landes v. Ralston Purina Co., et al., Civil No. 70-526 (D. Ariz., 1970) now pending as Civ. No. 70-2775-F (C.D. Cal., 12/11/70)

McMackin v. Schwinn Bicycle Company, Civil No. CA-4-1768 (N.D. Tex., 6/18/71)

Miner v. The Southland Corp. (and thirty-five related actions) Civil No. 46865 RHS (N.D. Cal., 4/10/67)

Nolan v. Ralston Purina Co., Civil No. 36954 (E.D. Mich., 8/18/71)

Ranells v. General Foods Corporation, Civil No. F-381 (E.D. Cal., 1/15/70)

Snyder v. Convenient Food Mart, Inc., Civil No. 71-C-804 (N.D. Ill., 3/31/71)

Vanlandingham v. Denny's Restaurants, Inc., Civil No. 69-424 (D. Ore., 7/24/69)

Vaughn, et al. v. Lum's, Inc., Civil No. 70-1852-Civ.-PF (S.D. Fla., 12/21/70)

Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., Civil No. 71-C-1089 (E.D. N.Y., 8/13/71)

Supreme Court, U.S.
FILED
JAN 7 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-810

CHICKEN DELIGHT, INC., CHICKEN DELIGHT OF CALIFORNIA, INC., and CONSOLIDATED FOODS CORP., *Petitioners*,

vs.

HARVEY SIEGEL and ELAINE SIEGEL, husband and wife, DAVID WITT, ROBERT VAN SCHAICK, RALPH R. ANDRE and RUTH L. ANDRE, husband and wife, and RICHARD ZACHARY, *Respondents*.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This Supplemental Brief is filed by petitioners, Chicken Delight, Inc., Chicken Delight of California, Inc., and Consolidated Foods Corporation, to call to the Court's attention the recent decision of the United States Court of Appeals for the Sixth Circuit in *Fortner Enterprises, Inc. v. United States Steel Corporation*, ___ F.2d ___ (filed December 16, 1971). It is submitted that this decision sig-

nificantly affects the pending Petition for Certiorari filed by these petitioners with respect to the question of "economic power" in that the holding of the Sixth Circuit is directly contrary to the Ninth Circuit's opinion herein.

In its decision below, the Ninth Circuit held that sufficient economic power over the tying product was conclusively established from the existence of Chicken Delight's trademarks and their use as an assumed tying device in a substantial number of franchise agreements. See Appendix A to the Petition for Certiorari at 10-11. The Ninth Circuit's holding was purportedly premised upon this Court's earlier opinion in the *Fortner* case itself (394 U.S. 495).

Petitioners contend that although such evidence may establish a *prima facie* case of economic power, the Ninth Circuit improperly extended *Fortner* by depriving defendants of the opportunity to produce evidence contrary to such a showing; we urge in the Petition that where, as at trial here, contrary evidence is proffered by the defendant-seller, the question of economic power should be presented to the jury for resolution. (See Petition at 22). Petitioners further suggest that cases subsequent to this Court's opinion in *Fortner* demonstrate substantial confusion concerning the scope and application of that decision. (See Petition at 23.)

With the new opinion of the Sixth Circuit in *Fortner*, that uncertainty has escalated into a direct conflict between the Sixth and the Ninth Circuits.[1] In its recent decision (a copy

[1] For the convenience of the Court, we briefly recapitulate the history of the *Fortner* litigation. Plaintiff's complaint, alleging a tie-in between defendants' offer of credit and the sale of pre-

of which is attached as an Appendix to this Supplemental Brief), the Sixth Circuit holds that where the seller presents evidence tending to show that it does not in fact possess a competitive advantage in the tying product market, the issue of economic power is not properly taken from the jury on a motion for directed verdict. The court further holds that the mere fact that a tie-in had been successfully employed by defendants—while admittedly evidence of such an advantage—does not foreclose contrary proof:

> "As we read the majority opinion in *Fortner*, the holding was that a tying arrangement achieves an unlawful restraint when 'the seller can exert some power over some of the buyers in the market.' The majority opinion did not hold that the acceptance of the tie-in by customers without more is proof of economic power. If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of

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fabricated steel homes was initially dismissed upon motion for summary judgment by defendants. The Sixth Circuit thereafter affirmed the order of dismissal in a *per curiam* opinion. Certiorari was granted and this Court, in a 5-4 decision, reversed and remanded the case for trial to determine whether defendants in fact possessed an economic advantage in the credit market.

Following this Court's decision, the case was tried to a jury. However, upon motion for directed verdict by plaintiff, the issue of economic power was resolved in its favor as a matter of law, and the case sent to the jury under instructions consistent with that ruling. The jury's verdict was returned for plaintiff. Appeal was thereafter taken by defendants with respect, *inter alia*, to the court's "economic power" ruling, and as set forth in the accompanying text, the Sixth Circuit has now reversed the district court and held that the question of economic power should have been submitted to the jury.

economic power in the tying product set forth in other portions of his opinion." (Appendix at xvii-xviii).

If there be any distinction at all between the Sixth Circuit's recent decision in *Fortner* and the instant case, it is that *Chicken Delight* involves a trademark license as the purported tying item. Yet that precise distinction was rejected by a majority of the Second Circuit in the *Carvel* litigation. See *Susser v. Carvel Corp.*, 332 F.2d at 518-19 (2nd Cir. 1964). The court there found that the presence of trademark licenses as the tying item was not dispositive of the economic power issue and further held that Carvel did not in fact possess a competitive advantage over its dealers—notwithstanding the apparent fact that some 400 franchisees had accepted license agreements containing the challenged tie-in. Indeed, as we pointed out in our prior petition, the Ninth Circuit's opinion explicitly recognized that it was contrary to the decision of the Second Circuit in *Carvel* with respect to this issue. See Appendix A to the Petition at 12 (n.7). It purported to justify that inconsistency on the basis of this Court's decision in *Fortner*. In light of the Sixth Circuit's holding upon remand in that case, however, petitioners respectfully submit that there is now an inescapable conflict between the decision below and the holdings of the Second Circuit in *Carvel*, the Sixth Circuit in *Fortner*, or both.

CONCLUSION

For the reasons set forth above and in the prior Petition, petitioners respectfully submit that a writ of certiorari should be granted to review certain portions of the decision and opinion of the United States Court of Appeals for the Ninth Circuit herein.

Dated, San Francisco, California,
January 5, 1972.

Respectfully submitted,

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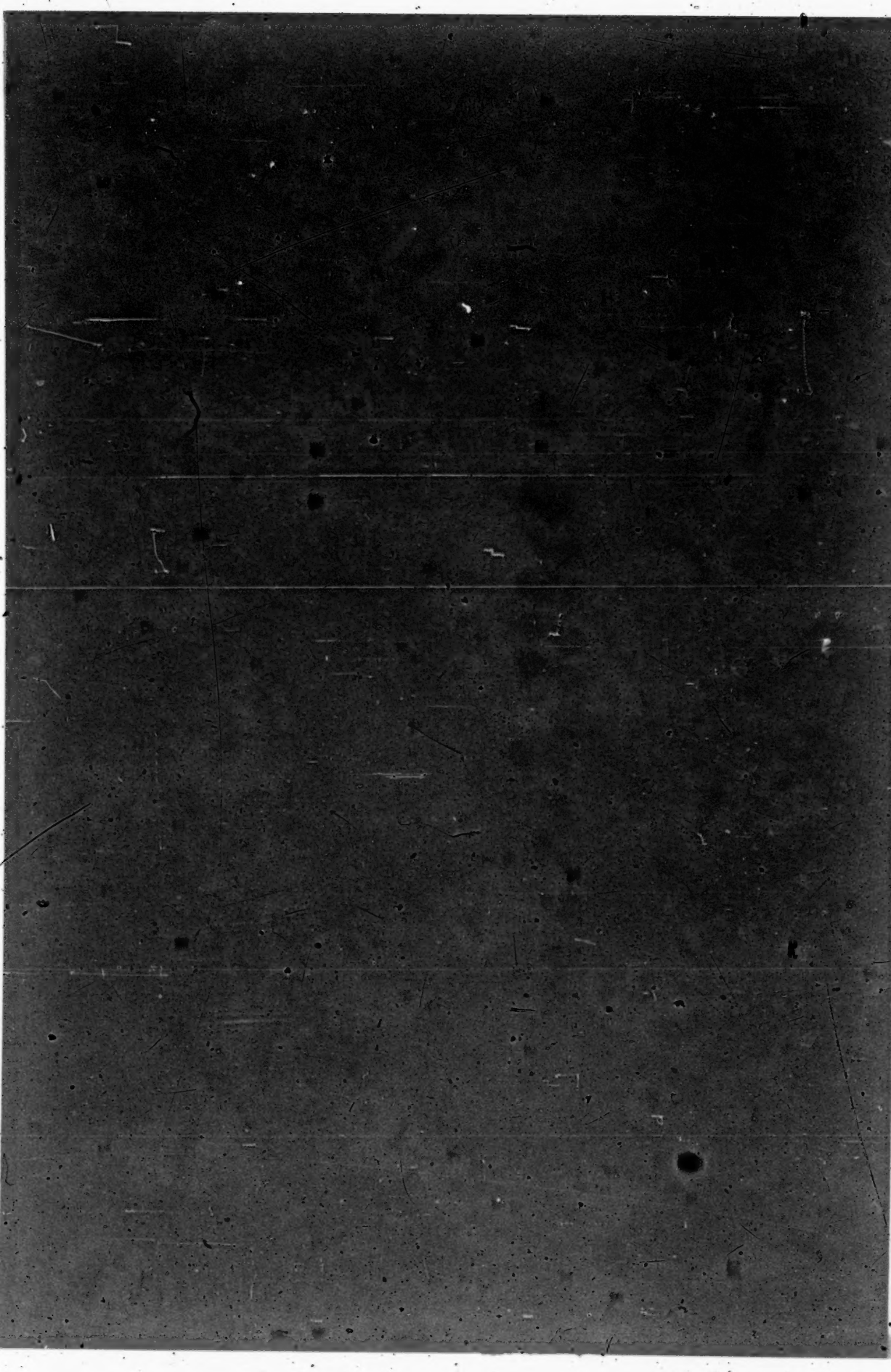
(Appendix Follows)



Appendix

No. 71-1194

United States Court of Appeals
for the Sixth Circuit

FORTNER ENTERPRISES, INC., *Plaintiff-Appellee,* vs. UNITED STATES STEEL CORPORATION and UNITED STATES STEEL HOMES CREDIT CORPORATION, *Defendants-Appellants.*	APPEAL from the United States District Court for the Western District of Kentucky, Louisville Division.

Decided and Filed December 16, 1971.

Before: MILLER and KENT, Circuit Judges, and CECIL, Senior Circuit Judge.

MILLER, Circuit Judge. This is the second appeal in this private antitrust action.[1] At the first trial the district court granted summary judgment for the defendants, holding that petitioner had failed to raise any question of fact as to a possible violation of the antitrust laws. *Fortner*

[1]The action was instituted by Fortner Enterprises, Inc. against U. S. Steel Corporation and its wholly owned subsidiary, the U. S. Steel Homes Credit Corporation, pursuant to Secs. 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2, seeking treble damages and injunctive relief against further violations.

Enterprises, Inc. v. U.S. Steel Corp., et al., 293 F.Supp. 762 (1966). The judgment was affirmed by this Court without opinion but the Supreme Court in a 5-4 decision, holding on the facts set forth in the record as it was constituted at that time, that summary disposition was improper and the action should go to trial, reversed the judgment of affirmance of this Court and remanded the action with directions that it proceed to trial. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). The majority and minority opinions in this case have stimulated much general interest and wide scholarly examination.[2] Upon remand, the district judge, after a trial before a jury which occupied approximately one month, sustained the plaintiff's motion for a directed verdict and overruled the defendants' similar motion. He submitted to the jury only the question of damages which should be awarded in favor of plaintiff. The jury re-

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[2]We are aware of the controversy which surrounds the tying arrangement cases generally, a controversy involving differences over both economic policy (See, e.g. Markovitz, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 Yale L.J. 1397 (1967); Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957); and the proper application of legal doctrine (See, e.g. Kauper, *The Warren Court and the Anti-trust Laws: Of Economics, Populism and Cynicism*, 67 Michigan L.Rev. 325 (1968); Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW.L.Rev. 626 (1965). We have studied with interest and special care the scholarly comments which the Supreme Court's opinions in this case have generated, finding especially useful a note: *The Logic of Foreclosure: Tie-in Doctrine after Fortner v. U.S. Steel*, 79 Yale L.J. 86 (1969). See also, Dam, *Fortner Enterprises v. United States Steel: "Neither A Borrower, Nor A Lender Be,"* 1969 Supreme Court Review 1; *Recent Trends in Supreme Court Antitrust Decisions: Commentary—Past, Present and Future*, 38 Antitrust Law Journal 602 (1969); *Note, Credit As a Tying Product*, 69 Col.L.Rev. 1435 (1969); and The Supreme Court, 1968 Term, 83 Harv.L.Rev. 235.

turned a verdict in the amount of $93,200.00 which was trebled by the court. Motions for judgment n.o.v. and, alternatively, for a new trial were denied and judgment for the plaintiff was entered on November 23, 1970. The defendants raise no question on the present appeal as to damages, having elected to limit the appeal to the issue of liability under the Sherman Act. Their insistence is that the court erred in directing a verdict in favor of the plaintiff and that, on the contrary, the court should have sustained the defendants' motion for a directed verdict. It is argued, in the alternative, that at least the case was one for the jury and that the action should be remanded for a new trial before a jury on the question of liability only, the damage issue already having been decided by a jury.

In its original and amended complaints the plaintiff charged that the defendants had engaged in a contract, combination, and conspiracy to restrain trade and to monopolize trade in the sale of prefabricated houses. Alleging that there was a continuing agreement between the defendants to force the plaintiff and other corporations and individuals, as a condition to availing themselves of the services of the Credit Corporation, to purchase at artificially high prices only U.S. Steel Homes, plaintiff specifically claimed that in order to obtain loans totaling over two million dollars from the Credit Corporation for the purchase and development of certain land in the Louisville, Kentucky, area, it had been required to agree, as a condition of the loans, to erect a prefabricated house manufactured by U. S. Steel Corporation on each of the lots purchased with the loan proceeds. It was further

claimed that the prefabricated materials were then supplied by U. S. Steel at unreasonably high prices and proved to be defective and unusable, thus requiring the expenditure of additional sums and delaying the completion date for the development.

To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. Where there is conflicting evidence or insufficient evidence to make only a "one way" verdict possible, a directed verdict is improper. *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-80 (1943); 5A *Moore's Federal Practice* ¶ 50.02[1] pp. 2321, 2. An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690 (1962); 5A *Moore's Federal Practice*, ¶ 50.02[1] pp. 2326, 7.

Examining the record on the basis of these standards and in the light of the Supreme Court's opinion in this case, we find that while the plaintiff made out a prima facie case of Sherman Act violations the evidence and permissible inferences therefrom are in such conflict that neither party was entitled to a directed verdict. Instead the question of liability should have been submitted to the jury as well as the question of damages. Both the plaintiff and defendants to support their respective positions rely upon the Supreme Court's opinion in this case on the

first appeal. In doing so they quote selective portions from the opinion which tend to indicate some support for the particular views which they espouse. It becomes necessary, therefore, in the resolution of this appeal to examine the Supreme Court's opinion to discover its real thrust and impact in the context of the facts of the present litigation as they were developed at the second trial.

At the outset it is well to bear in mind that on the first appeal the Supreme Court was not considering the alleged antitrust violations in the light of a full trial on the merits. Rather the specific question before it was a procedural one, i.e., whether it was appropriate for the district court on the basis of the facts as they had been developed from affidavits and pretrial procedures to dispose of the case by summary judgment. That the Court did not intend to indicate any view as to what the trier of the facts should find from the evidence was expressly pointed out when the Court said that it might turn out that the plaintiff's allegations will not be sustained when the case goes to trial. "It may turn out," as the Court further stated, "that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such a conclusion as a matter of law, and it is not our function to speculate as to the ultimate findings of fact." It is also of significance that the Court indicated its reluctance to dispose of antitrust cases by summary procedure. Addressing itself specifically to the use of summary judgment procedure in antitrust cases, the Court stated: "Since summary judgment in antitrust

cases is disfavored, *Poller*,[1] *supra*, the claims of uniqueness in this case should be read in the light most favorable to petitioner." (Plaintiff).

It was developed at trial that the Homes Division of U. S. Steel manufactures component parts for prefabricated houses, selling what it terms home packages in various states. The sales are made through dealer-builders such as the plaintiff. U. S. Steel's subsidiary, the Credit Corporation, was founded in 1954 as a wholly owned subsidiary for the purpose of providing financial assistance to the Homes Division's dealer-builders who were unable to obtain suitable financial assistance from more conventional sources. In effect the services of the Credit Corporation were a "tool" to assist the Homes Division in the sale of its houses. Beginning in 1958 the policies of the

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[1] In *Poller v. Columbia Broadcasting Co., Inc., et al.*, 368 U.S. 464, 473 (1962), the Court in stating that summary procedures should be used sparingly in complex antitrust litigation used language which we think is of significance in determining the appropriateness of directing a verdict in this case rather than submitting the issues to a jury for evaluation:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Although summary judgment and a directed verdict are procedurally distinguishable both substitute the court for the jury as the factfinder. Some of the considerations dictating a reluctance to resort to summary judgment in complex antitrust cases are equally applicable to the direction of a verdict.

Credit Corporation were changed, when a program of "special assistance" was initiated whereby credit was made available in high risk situations on particularly reasonable terms to Homes Division dealer-builders. As reflected by the minutes of the U. S. Steel finance committee, the purpose of the policy was to enable Homes Division "to attain a minimum of 1800 units in 1959." To reach this goal and such additional distribution as may be feasible the Credit Corporation was directed to make loans to dealers without conformity to conventional or conservative patterns "but within the bounds of prudent business judgment." It was contemplated that Homes Division would underwrite such loans, guaranteeing losses to a defined extent.

In 1959 it came to the attention of the Homes Division that certain land in an existing subdivision in the Louisville, Kentucky, area might be available for development. The land was owned by a corporation in which A. B. Fortner, a successful and well-known real estate developer, held a 50% interest. Later in that year U. S. Steel initiated discussions with Fortner with the idea that the property might be an attractive vehicle for it to enter the Louisville prefabricated housing market. Following negotiations an agreement was reached whereby Fortner's wholly-owned corporation, Fortner Enterprises, Inc., would become a franchised dealer-builder of the Homes Division product. It was part of the agreement that the Credit Corporation would extend credit to the plaintiff corporation for the development conditioned upon the construction on each of the 187 lots purchased by the plaintiff, a prefabricated house from the Homes Division of U. S. Steel.

The initial loan was $2,053,300.00. Interest at the rate of six per cent per annum, plus a service charge of one-half of 1%, was to be charged. Of the total commitment, $373,200.00 was to cover the cost of acquisition and development of the lots; the remainder was to cover the purchase and construction of the houses. The land loan equaled 100% of the cost of the land acquisition and development.

There was evidence that the plaintiff experienced difficulties with the U. S. Steel products, including the omission of parts and the delivery of defective parts which necessitated additional work. Substantial complaints were made with respect to the Homes Division products from home owners who had purchased the homes from Fortner. Yet during this period Fortner requested additional financing for the purchase and development of land on which Homes Division houses were to be placed. Thus, on August 2, 1961, Fortner executed a land and mortgage note in the amount of $59,000.00 and a construction note in the amount of $403,400.00. Having continued to experience difficulties with the prefabricated houses and having run out of cash, Fortner requested that he be relieved of the requirement that the financing be used for the construction of Homes Division houses. This request was refused but Fortner was advised that he was free to refinance the Credit Corporation's loan and proceed to obtain houses from other sources. Thereafter, in July 1962 he instituted the present action.

In *Northern Pacific Railway Co., et al. v. United States*, 356 U.S. 1 (1958), the Supreme Court defined the tying arrangement device, identified its evils and stated the prerequisites for per se illegality in the following fashion:

For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California v. United States*, 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594.

They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. *International Salt Co. v. United States*, 332 U. S. 392. Cf. *United States v. Paramount Pictures*, 334 U. S. 131, 156-159; *United States v. Griffith*, 334 U. S. 100. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took

> sugar if would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself. 356 U. S. at 5, 6 and 7.

Once it is established that a tying arrangement exists, it must be determined whether a "not insubstantial" amount of commerce is affected by the tie and whether the tier has "sufficient economic power" in the market for the tying product.

We need not deal at length with whether a "tying arrangement" exists in this case, nor whether the amount of commerce affected is "not insubstantial." The Court rejected Mr. Justice Fortas' argument that this was not a "tying arrangement":

> We agree with the District Court that the conduct challenged here primarily involves a tying arrangement of the traditional sort. 394 U.S. at 498.

On the matter of whether the volume of commerce allegedly foreclosed was "not insubstantial" the Court stated:

> The complaint and affidavits filed leave no room for doubt that the volume of commerce allegedly foreclosed was substantial. It may be true, as respondents claim, that petitioner's annual purchases of houses from U. S. Steel under the tying arrangement never exceeded $190,000, while more than $500,000 in annual sales was involved in the tying arrangement held illegal in *International Salt, but we cannot agree with respondents that a sum of almost $200,000 is paltry or "insubstantial."* 394 U.S. 501, 2. (Emphasis added).

The issues raised regarding the second standard, that of "sufficient economic power," is far more troublesome, but

we think that so far as the present record reflects, the issue should have gone to the jury. Of this issue, Mr. Justice Black stated that ". . . the pleadings and affidavits sufficiently disclose the *possibility* of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue." (Emphasis added).

In other Supreme Court cases in which a "tying arrangement" has been found to be illegal per se under the Sherman Act, this question did not pose the same factual uncertainty as here. Sufficient economic power was shown in *International Salt Co. v. United States*, 332 U.S. 392 (1947), by the simple fact that the tying product was patented, in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the tying product was copyrighted; and in *Northern Pacific Railway Co., et al. v. United States*, 356 U.S. 1 (1958), it was the physical uniqueness of the land which constituted the tying product.

Here no such talisman exists. The Court rejected Fortner's "apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" Having done so, however, the Court refused to specify precisely what proof would satisfy the standard of the per se rule. Yet the Court was not entirely silent as to the sort of proof which could be weighed in determining the existence of the necessary "economic power" in the tying product.

Under the antitrust statutes, the tying cases are fundamentally based on the notion that competitive advantage in one market (that of the tying product), whether the result of a patent, copyright, physical uniqueness, a cost advantage or whatever else, might serve as a source of

leverage, should not be translated into a competitive advantage in another distinct market (that of the tied product).

The focus of our present inquiry is whether the Credit Corporation possessed leverage in the credit market (the "tie" here being the extension of credit) sufficient to induce buyers in the market for prefabricated houses (the "tied" product) to accept a less competitive product.

It is clear that such leverage need not be of sufficient magnitude to constitute monopoly power or even market dominance. As stated in the majority opinion in this case:

> The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market. See, *e.g., International Salt; Northern Pacific; United States v. Loew's Inc.*, 371 U.S. 38 (1962). 394 U.S. at 502, 3.

And in *United States v. Loew's Inc.*, 371 U.S. 38 (1962), the Court stated:

> . . . . Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. 371 U.S. at 45.

As we have pointed out, the Court expressly rejected Fortner's "apparent" argument that the uniqueness of the loan, namely the fact that one hundred per cent land financing may have been unavailable elsewhere in Louisville

at the time the loan commitment was made, alone constitutes proof of "sufficient economic power." It was apparently the view of the Court that, while plaintiff need not prove dominance in the credit market on the part of the Credit Corporation, it must prove that the "unique and unusual" terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The Court pointed to two possible sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville. The Court did not preclude the possibility of other sources of leverage.

Turning to the evidence with respect to these two possible sources of economic power suggested by the Supreme Court, judicial notice may be taken of the fact that national banks may make loans only on improved real estate, and that federally insured savings and loan associations are limited to loans up to 70% of the real estate as developed. Yet the record appears to be barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, and insurance companies. A jury should be permitted to evaluate the significance of the freedom of such traditional lending sources from any restriction against extending 100% financing in deciding whether competitors in the Louisville credit market were precluded from offering credit on such terms. On the same facet of the case there was testimony at trial that soon after plaintiff negotiated its financing

terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis. Such fact, while not conclusive of the situation as it existed at the time plaintiff's loans were consummated, could be appropriately considered by a jury in reaching the ultimate conclusion whether the Credit Corporation had economic power in the credit market so as to come within the per se rule. Further, while the plaintiff offered some evidence that 100% financing was not generally available on the Louisville market at the time of its financing with the Credit Corporation, it must be conceded that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors, as appropriately pointed out by the defendants, include the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be insufficient to establish the fact that it is unable to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower.

As to the second factor suggested by the majority opinion, (that of a possible cost advantage) we again find that the record is open to varying interpretations, inferences and conclusions. It is true that the Credit Corporation as a wholly owned subsidiary of U. S. Steel was able to obtain funds for lending purposes at the prime rate, and that U. S. Steel necessarily stood behind repayment of any funds which the Credit Corporation was required to borrow. Also, as a subsidiary of U. S. Steel, it may be inferred that the Credit Corporation was not expected to maximize profits

but to assist in the sales of the Homes Division houses. During the relevant period no dividends were paid to the parent corporation and there is no evidence that the Credit Corporation competed aggressively as a lender. These considerations could conceivably be taken by a jury as some evidence that the Credit Corporation was able to make loans at a level of risk unacceptable to most lending institutions. On the other hand, the record justified the conclusion that the Credit Corporation, while not operating at a loss, had comparatively low profits. Its total net profits in 1960 and 1961 were $52,197.00 and $59, 053.00, respectively. In those same years its earnings in relation to net worth were 4.5% and 4.8%. At least two local mortgage companies in Louisville had higher earnings in relation to net worth in both of these years. There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation. Of course, the Credit Corporation, as the evidence demonstrated, incurs the usual operating costs of a lending institution, including clerical and management salaries, rent, charges for office equipment, supplies, services, taxes, etc. Moreover, it would be relevant for the jury to take into account that the Credit Corporation operates at some disadvantage in that traditional lending agencies doing business in a community on a continuing basis serve a concentrated geographic area having a larger and more diversified clientele of borrowers permitting them to achieve cost savings and efficiencies not available to a lender engaged in a business like that of the Credit Corporation. It is also possibly true that traditional lending institutions are in position to spread their risks and costs both over a larger volume of business and over different areas of the economy.

The Credit Corporation obtained its funds primarily from banks. In 1961 it had borrowed from banks approximately ten to fourteen million dollars. For the borrowing of these funds it paid the prime rate. On the funds which it borrowed from U. S. Steel it paid the prime rate plus one per cent. It may be that the jury could infer from the record that the Credit Corporation incurred higher costs in acquiring money to lend than the costs incurred by commercial banks, savings and loan associations and insurance companies. In this connection it must be remembered that we are here dealing not with advantages which a finance subsidiary may give to its parent in relation to competitors in the parent's line of business, but with the question whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market.

Plaintiff also points to the fact that the Homes Division guaranteed or underwrote the land financing extended to plaintiff and certain others. It is argued that this fact demonstrates economic power over credit. This conclusion, in our view, is not necessarily true. On the contrary, it may simply be a factor which demonstrates that it was necessary for the Credit Corporation to be subsidized against any loss incident to the greater cost and risk involved. Doubtless other lending institutions in the relevant market were of sufficient strength and soundness to inspire confidence in their loan commitments.

Plaintiff's reference to the Supreme Court majority's statement in regard to the Homes Division houses being priced some $400.00 higher than comparable houses would not appear to have any conclusive effect on the question which we are now considering. It is clear from the opinion

that Mr. Justice Black and those justices who joined him in the majority opinion did not reach any definitive conclusion as to the effect of this factor. On the contrary, as pointed out, they merely said that a substantial price differential "may suggest" or is not inconsistent with the "possibility of market power." The evidence on this question should be weighed by the jury and its proper probative value determined.

While the plaintiff claims a violation of Sec. 2 of the Sherman Antitrust Act, we do not deem it necessary to discuss the evidence on this question since it consists substantially of the same evidence offered in support of the alleged Sec. 1 violation. We are satisfied that the total evidence, measured in terms of the principles enunciated by the majority opinion of the Supreme Court on the first appeal, make it inappropriate for the Court to approve a directed verdict for either party in this case on the liability issues under Secs. 1 and 2 of the Sherman Act.

In *Advance Business Systems & Supplies Co. v. SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), the Court, as the plaintiff argues, interpreted Fortner as holding that "... the 'sufficient economic power' test of per se illegality is satisfied when it appears that the seller has the power to "impose other burdensone terms such as a tie-in with respect to any appreciable number of buyers within the market.' " Plaintiff in its brief relies upon this interpretation and insists that the directed verdict in its favor was justified on the basis of this interpretation of *Fortner* by the Fourth Circuit. As we read the majority opinion in *Fortner*, the holding was that a tying arrangement achieves an unlawful restraint when "the seller can exert some power over some of the buyers

in the market." The majority opinion did not hold that the acceptance of the tie-in by customers without more is proof of economic power. If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of economic power in the tying product set forth in other portions of his opinion.

The judgment of the district court insofar as it sustained the plaintiff's motion for a directed verdict is accordingly reversed, and the action is remanded to the district court for trial before a jury on the question of liability under Secs. 1 and 2 of the Sherman Act. The judgment is affirmed insofar as it denied the defendants' motion for a directed verdict.[4]

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[4]We have not undertaken in this opinion to discuss all of the items of evidence bearing upon the question of economic power. Plaintiff relies heavily, for example, upon evidence tending to indicate that the Credit Corporation was both able and willing to lend to high risk borrowers at a rate of interest commensurate with a much lower level of risk, i.e., to offer credit on terms otherwise unavailable at the time. The guarantees and the Credit Corporation's relationship to U. S. Steel are pointed to as possible sources of leverage. Upon remand, these items and the entire range of evidence bearing upon this issue should be submitted to the jury. Insofar as the complaints allege a per se violation due to a tie-in, assuming that the evidence developed is substantially the same as that offered at the first trial, the trial judge may appropriately instruct the jury that the tie-in itself has been established as a matter of law, and that the amount of commerce affected is "not insubstantial." On this aspect of the case, the issue for the jury is whether the Credit Corporation, in the language of *Northern Pacific Railway Co., et al. v. United States, supra,* had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ." Admittedly this is a standard which must vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence (some of which we have commented upon) free from the limitations of an arbitrary definition.

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United States

OCTOBER TERM, 1971

No. 71-810

CHICKEN DELIGHT, INC., CHICKEN DELIGHT OF CALIFORNIA, INC., and CONSOLIDATED FOODS CORP., *Petitioners*,

vs.

HARVEY SIEGEL and ELAINE SIEGEL, husband and wife, DAVID WITT, ROBERT VAN SCHAICK, RALPH R. ANDRE, and RUTH L. ANDRE, husband and wife, and RICHARD ZACHARY, *Respondents*.

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Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 4, 5

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United States v. Frankfort Distillers, Inc., 324 U.S. 293 (1945) 19

United States v. Loew's, Inc., 371 U.S. 38 (1962) 5, 9, 12, 15

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 9

Other Authorities

Baker, Another Look at Franchise Tie-Ins After Texaco and Fortner, 14 The Antitrust Bull. 767 (1969) 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-810

CHICKEN DELIGHT, INC., CHICKEN DELIGHT OF CALIFORNIA, INC., and CONSOLIDATED FOODS CORP., *Petitioners,*

vs.

HARVEY SIEGEL and ELAINE SIEGEL, husband and wife, DAVID WITT, ROBERT VAN SCHAICK, RALPH R. ANDRE, and RUTH L. ANDRE, husband and wife, and RICHARD ZACHARY, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Harvey and Elaine Siegel, *et al.* respectfully pray that the Petition for a Writ of Certiorari (No. 71-810) filed December 20, 1971 by Chicken Delight, Inc., *et al.*, be denied. Respondents further pray that their own Petition for a Writ of Certiorari (No. 71-824) filed December 22, 1971 be granted.

QUESTIONS PRESENTED

Stripped of argumentative assertions the questions presented by this petition would appear to be

1. Does the licensing, by a franchisor, of unique, registered trademarks, trade name and system of operation only on condition that the franchisees buy their total requirements of certain packaging materials, food mixes and cooking machines exclusively from the franchisor constitute a tying arrangement under section 1 of the Sherman Act?

2. Does the tying item—Chicken Delight's package of unique, registered trademarks, trade name and system of operation—possess sufficient economic power, as a matter of law, to render the tying arrangement unlawful *per se* under section 1 of the Sherman Act?

3. Under what conditions may an otherwise *per se* unlawful tying arrangement be justified?

STATEMENT OF THE CASE

(a) Nature of the case

This is a class action antitrust suit in which approximately 800 current and former franchisees of Chicken Delight seek treble damages for overcharges on required purchases of packaging materials, dry food mixes and cooking machines. From the inception of its franchise system, Chicken Delight required its franchisees to purchase their full requirements of the above items exclusively from Chicken Delight as a condition of the initial grant of a trademark license and as a condition on the right of con-

tinued use of the Chicken Delight trademarks, trade name and system of operation. The District Court and the Court of Appeals for the Ninth Circuit ruled that this arrangement is a tie-in, unlawful *per se* under section 1 of the Sherman Act, and unjustified by any purported legitimate business purpose of the defendants.[1]

(b) Chicken Delight's franchise agreements and operations

Chicken Delight licenses its franchisees to prepare food for sale to the public pursuant to specifications relating to cooking methods, packaging and service. Chicken Delight itself manufactures nothing which the franchisees sell to the public; franchisees prepare all meals with which the Chicken Delight trademarks are associated. Petitioners have obscured the issues by attempting to bring themselves within the scope of authorities concerned with restrictions imposed on franchised distributors by *manufacturers* of trademarked or brand name products. They discuss, indiscriminately, the trademark license ("image" franchising) situation and the distribution of trademarked goods, without identifying which situation is under discussion.[2]

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[1] In addition, the District Court ruled that proof of direct overcharges on the tied items established the *fact* of damage as a matter of law. This ruling on damages was reversed by the Court of Appeals. The propriety of this reversal is presented for determination by this Court in the Petition for a Writ of Certiorari (No. 71-824) filed December 22, 1971 by respondents herein. It is respondents' position that this ruling on damages is the only issue which merits the consideration of this Court.

[2] *See, e.g.*, Petition at 11-16. Compare,

> "The concept of 'franchising' covers at least two different types of factual situations. The first involves the distribution of finished manufactured goods: the manufacturer (such as General Motors or Schwinn) is using its 'franchise' system to distribute its trademarked goods. The second type of 'franchise' arrangement is basically a trademark or tradename licensing program: the owner of the mark (such as Carvel)

This fact is critical: the items the franchisees were forced to buy from Chicken Delight were items, manufactured by third parties, designed to implement the sale of the trademarked products, and were not themselves the trademarked products. The franchise agreements licensed the right *to prepare and serve to the public hot, freshly prepared chicken and other cooked meals.*[3] It was cooked chicken, not cooking machines, dry batter mix, dry barbecue seasoning mix, paper plates, tubs or pizza boxes which the public associated with the name "Chicken Delight".

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS PROPERLY CONSTRUED AND APPLIED FORTNER[4]

To establish an unlawful tying arrangement the plaintiff must demonstrate: (1) that the arrangement involves two or more distinct products and provides that one may not be obtained unless the other is also purchased, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594,

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licenses franchisees to conduct a certain type of enterprise under a common tradename or trademark." * * *

"The two types of franchise arrangements involve somewhat different types of antitrust issues. The 'distribution' type of franchise arrangement is most directly affected by the *Schwinn*-type rules on resale. Meanwhile, the 'license' type of franchise arrangement is most affected by the tie-in rules, since such arrangement is often based on some sort of tie-in between the trademark and some products which the franchisor requires his franchisees to buy."

Baker, *Another Look at Franchise Tie-ins After Texaco and Fortner*, 14 The Antitrust Bull. 767 (1969).

[3] *See, e.g.*, Appendix C to the Petition.

[4] *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

613-614 (1953); (2) that the tying item possesses sufficient economic power to appreciably restrain competition in the tied product market, *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 6 (1958); and (3) that a "not insubstantial" amount of commerce in the tied product market is affected, *International Salt Co. v. United States*, 332 U.S. 392, 395-96 (1947). Chicken Delight concedes that the third requirement has been satisfied (Petition at 19 n. 10) but denies the existence of the first two. In addition, Chicken Delight apparently contends that at least in the "franchising" context the plaintiff must also prove that the tie-in was made *"with the purpose or effect of market power extension"* (Petition at 14) and that the tying arrangement was not justified by legitimate business purposes. It is clear, however, that these latter two contentions are unfounded and that the lower courts properly determined that the first two requirements had been satisfied.

A. Two Products—the Package of Trademarks, Trade Name and System Is Distinct From the Packaging, Cooking and Seasoning Tied Items.

Under section 1 of the Sherman Act, any property, tangible or intangible, may be a tying item. Tying items have been found under the Sherman Act among such diverse non-commodities as credit,[5] motion picture exhibition rights,[6] trademark licenses,[7] photocopy equipment

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[5] *Fortner Enterprises, Inc. v. United States Steel Corp., supra.*

[6] *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

[7] *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Susser v. Carvel Corp.*, 332 F.2d 505 [majority opinion, at 519; dissenting opinion at 513] (1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965); *Arthur Murray, Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138 (8th Cir. 1969).

service contracts,[8] real estate leases,[9] and news wire services.[10]

Chicken Delight seeks to convey the impression that the lower courts applied a formalistic, mechanical test to determine the existence of distinct tying and tied products.[11] It then proceeds to state the "correct" principle to be "the combining of a dominant desired product with the 'forced purchase of a second commodity' *for the purpose of market extension.*" Petition at 13; emphasis in original. Leaving for later discussion the reference to the purpose of the tie-in, the principle as stated by Chicken Delight is identical to that applied by the lower courts. See Appendix A to the Petition at 5-9; Appendix B to the Petition at 3.

Both the District Court and the Court of Appeals applied a functional market analysis to the issue, examined the tying and tied products in the economic context in which the tie-in existed and then determined that two distinct products, not merely physically or conceptually separable but separated in actual market usage, existed.[12]

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[8] *Advance Business Systems & Supply Co. v. SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

[9] *Northern Pacific R. Co. v. United States, supra.*

[10] *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965).

[11] *See, e.g.*, Petition at 12 ". . . merely in the conjunctive marketing of items which are conceptually severable."; Petition at 13 ". . . the mere coupling of physically separable objects . . ."

[12] *See, e.g.*, the statement of the Court of Appeals, Appendix A to the Petition at 6-7 n. 4:

> "In determining whether an aggregation of separable items should be regarded as one or more items for tie-in purposes in the normal cases of sales of products the courts must look to the function of the aggregation. Consideration is given to such questions as whether the amalgamation of products resulted in cost savings apart from those reductions in sales

Following the statement quoted in the footnote, the Court of Appeals analyzed the role and function of trademark licenses in the "image" franchising industry and concluded that the trademark license was functionally distinct from the myriad other products used by a franchisee to prepare, package and market the end product with which the trademark is actually associated. Appendix A to the Petition at 7-9.

Chicken Delight concedes that a trademark license can be a tying product, i.e., a functionally distinct and separate item. Petition at 14. Elsewhere it states that in fact most companies in the fast food industry do charge for their trademark licenses separately from other products which they might sell to their franchisees. Brief of Re-

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expenses and the like normally attendant upon any tie-in and whether the items are normally sold or used as a unit with fixed proportions.[4]

"[4]It should be readily apparent that, measured against these tests, the package sales here in question are quite different from the sale of an automobile and its tires or a left shoe and the right. In particular, there are several factors in this case which other courts have deemed sufficient to find a tie-in. Undisputed testimony at trial established that other franchisors in fast food businesses similar to that of Chicken Delight sold their licenses separate from the essential supplies. The various supplies sold here were sold individually and in differing amounts, rather than in a preassembled package, and the franchisees were billed accordingly. At no time were the franchises required to purchase all their various supplies from Chicken Delight. Chicken Delight did not itself manufacture the tied items. See Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 764 (6th Cir. 1965); United States v. Jerrold Electronics Corp., supra, 187 F.Supp. at 559."

and the statement of the District Court, Appendix B to the Petition at 3:

"In the economic context of present franchising trends, it is clear that a franchise license is marketable separate and apart from the various products which the franchisees are required to purchase from and through the franchisor."

spondents in Opposition to Petition (No. 71-824) at 3. And yet, it continues to assert that in compelling its franchisees to purchase their requirements of cooking equipment, dry food mixes and packaging materials as a condition of obtaining a trademark license Chicken Delight was not imposing a tie-in but rather was selling a package—a single product—the Chicken Delight "system". The apparent rationale is that since each of these discrete items was "essential" to the successful operation of a Chicken Delight franchise, in combination they constitute a single product. But, as the Court of Appeals noted

> "[t]he relevant question is not whether the items are essential to the franchise, but whether it is essential to the franchise that the items be purchased from Chicken Delight. This raises not the issue of whether there is a tie-in but rather the issue of whether the tie-in is justifiable, . . ." Appendix A to the Petition at 9.

The District Court and the Court of Appeals properly determined the Chicken Delight trademark license to be a separate and distinct tying item. This result is supported by substantial authority. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Susser v. Carvel Corp.*, 332 F.2d 505 [majority opinion at 519; dissenting opinion at 513] (2nd Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965); *Arthur Murray Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138 (8th Cir. 1969).

B. The Chicken Delight Trademark License, as a Matter of Law, Has Sufficient Economic Power to Appreciably Restrain Trade.

As a second ground justifying review by this Court, Chicken Delight asserts that both the District Court and the Court of Appeals erroneously applied this Court's decision in *Fortner Enterprises, Inc. v. United States Steel Corp., supra*, "by converting an evidentiary presumption of economic power into irrebuttable proof." Petition at 19. The most cursory reading of the opinions below demonstrates that such is not the case.

Prior decisions of this Court have made it unmistakeably clear that the existence of sufficient economic power in the tying item is presumed where the tying item is patented, *International Salt Co. v. United States, supra*; where the tying item is copyrighted, *United States v. Loew's Inc., supra*; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); and where the tying item is physically unique as in the case of land, *Northern Pacific R. Co. v. United States, supra*. In *Fortner, supra*, this Court explained the significance of uniqueness of the tying item and distinguished the allegations in that case as follows:

> "[w]e do not mean to accept petitioners' apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.' We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors.[2]
>
> "[2]Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such

The present case involves a unique item, a combination of registered trademarks, tradename and symbols. No other franchisor in the fast food industry can offer this item to prospective franchisees without violating the trademark laws which grant to Chicken Delight a proprietary interest therein. The Court of Appeals properly concluded that

> "[j]ust as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trade-mark presents a legal barrier against competition. It is not the nature of the public interest that has caused the legal barrier to be erected that is the basis for the presumption, but the fact that such a barrier does exist. Accordingly, we see no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trademark." Appendix A to the Petition at 12.

The above quote from *Fortner* thoroughly disposes of the purported conflict between the decision in this case and the recent decision of the Court of Appeals for the Sixth Circuit reversing a directed verdict for the plaintiff

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barriers may be legal, as in the case of patented and copyrighted products, e.g., International Salt; Loew's, or physical, as when the product is land, e.g., Northern Pacific. It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." 394 U.S. at 505.

on the remand of *Fortner Enterprises, Inc. v. United States Steel Corp.* Supplemental Brief in Support of Petition (No. 71-810). The instant case involves a unique item. In *Fortner* the tying item was money—in the words of Mr. Justice White—"the most fungible item of trade since it is by definition an economic counter." *Fortner Enterprises, Inc. v. United States Steel Corp.*, dissenting opinion of Justices White and Harlan, 394 U.S. at 515. Thus, in *Fortner* any barrier to competition was economic rather than legal. Competing lending companies were precluded, if at all, solely by U.S. Steel's cost advantages in providing credit. For this reason, a directed verdict in *Fortner* would be improper, the existence of unique economic advantages in that context is clearly a question of fact. Not so when the tying item itself is unique.

Therefore, the District Court and the Court of Appeals properly held that the presumption of sufficient economic power applied to this case. While Chicken Delight concedes that such an evidentiary presumption of economic power applies to this case (Petition at 19) it contends that the lower courts transformed it into conclusive, irrebuttable proof, and argues that it is entitled to produce evidence to rebut this presumption. Petition at 23. Chicken Delight did have this opportunity. However, the only evidence offered, on which reliance is now placed, is to the effect that Chicken Delight enjoyed no monopoly as a franchisor but had to compete for franchisees with other firms which offered trademark licensing programs based upon their own unique and desirable trademarks. Petition at 22. Those facts, if taken as true, do not detract from the finding that *Chicken Delight* had sufficient economic power (albeit per-

haps not the only franchisor so situated) to appreciably restrain competition in the tied products. *United States v. Loew's, Inc., supra* at 49.

This Court has made it abundantly clear that the party imposing a tie-in need not have monopoly nor even dominant market power to produce a tying arrangement which *per se* violates the antitrust laws. In *Fortner Enterprises, Inc. v. United States Steel Corp., supra,* this point was underscored as follows:

> "[t]he standard of 'sufficient economic power' does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakeably clear that the *economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.* See, e.g., International Salt; Northern Pacific; United States v. Loew's Inc. As we said in the Loew's case, 317 U.S. at 45: 'Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.'
>
> "These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, *the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not*

> *complete over them and over all other buyers in the market.* * * * Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."
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> 394 U.S. at 502-503; emphasis added.

This holding also disposes of the purported conflict between the present case and the decision of the Court of Appeals for the Second Circuit in *Susser v. Carvel Corp., supra.* The *Susser* court held that Carvel did not have sufficient economic power because it did not command a dominant position in the market for the tying item. 332 F. 2d at 518-521. Undoubtedly, if *Susser* were tried today the Second Circuit would reach the opposite result.

C. Plaintiffs Need Not Show That the Tie-In Restrains Trade But This Fact is Demonstrated by the Record in This Case.

Chicken Delight repeatedly argues that the prohibition against tying arrangements should not be applied to its practices because, it is claimed, plaintiffs have not established the practice to be anticompetitive in purpose or effect. Petition at 14. This argument finds no support in the cases and is contrary to the facts as well.

An arrangement is *per se* unlawful under the Sherman Act if it is a tie-in, if the tying item has sufficient economic power and if a not insubstantial dollar volume of commerce in the tied items is affected. Where, as here, a plaintiff has established those three elements (which are objective tests, neither irrational nor blindly invoked, as Chicken Delight asserts) and damages arising from the arrangement, his burden is satisfied.

Chicken Delight's position that its tying arrangement cannot be found unlawful absent evidence of substantial market foreclosure in the tied product markets is fallacious. In *Fortner,* this Court reiterated the oft-stated rule that when the prerequisites of tying arrangements are found to exist those arrangements "are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required." *Fortner Enterprises, Inc. v. United States Steel Corp., supra* at 498. Market foreclosure figures are irrelevant, except to show that the volume of commerce foreclosed is not *de minimis.* As this Court stated in *International Salt Co. v. United States, supra*

> "[u]nder the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at a full gallop; nor does the law await arrival at the goal before condemning the direction of the movement." 332 U.S. at 396.

Tying arrangements "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use . . ." *Northern Pacific R. Co. v. United States, supra,* 356 U.S. at 5. "Where such conditions [tie-ins] are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." *Id.,* at 6. The economic evils inherent in tying arrangements which the law condemns are the denial of free access by competing sellers to the tied product market and the denial of free choice between competing products on the part of buyers af-

fected by the tie-in. *Fortner Enterprises, Inc. v. United States Steel Corp., supra,* at 498-499; *United States v. Loew's, Inc., supra,* at 45. Both of these consequences are undeniably present in the Chicken Delight system. No fewer than 1,000 business enterprises were denied the freedom to trade with suppliers of the tied items who competed in the open market and whose prices and terms of sale were molded by the forces of competition. Sellers of the tied commodities, on the other hand, were denied access to the captive market, measured in millions of dollars annually, which Chicken Delight had carved out for itself with its contractual tie-ins.

Chicken Delight argues that this situation was not anti-competitive, however, because sale of the tied commodities was "incidental" to its operation as franchisor of the Chicken Delight system (Petition at 15) and because there is no evidence of market power extension because it "offered the required items for sale only to its franchisees, and only as an incident to their respective operations as authorized Chicken Delight franchise outlets." Petition at 7. But how can it be true that the sale of the tied items was only incidental to the operation of the Chicken Delight "system" when the revenues from these sales constituted the "sole source of trademark revenue"? Brief in Opposition to Petition (No. 71-824) at 2.

The greatest evil of tying arrangements is that they preclude competition on the merits between products in the tied product markets. The tier-in is able to exact a greater return for its product than free competition on the merits would permit. This is exactly what occurred under the Chicken Delight system. The fact that Chicken

Delight sold the tied products only to its franchisees, far from exonerating it from liability should confirm that it was indeed using the leverage produced by its trademark licenses to create a captive market for the tied products. Chicken Delight could not sell the tied items to independent purchasers at the prices it could exact by the terms of its standard franchise contract. *Fortner Enterprises, Inc. v. United States Steel Corp., supra,* at 504. An extraneous factor has been injected into the tied product markets and the interaction of competitive forces has been frustrated.

D. Chicken Delight's Tying Arrangements Are Totally Unjustified.

If Chicken Delight's arguments regarding the issue of justification had any relevance to this case it was only with respect to the dry food mixes and the cooking equipment. With respect to the packaging materials it is undisputed that the only specifications required were printing and color. Chicken Delight has admitted that any competent manufacturer of like products could consistently and satisfactorily manufacture the packaging products if Chicken Delight furnished the specifications. Appendix B to the Petition at 9. As the District Court noted the only showing made by Chicken Delight to justify the tie of packaging materials was a recitation of the need for distinctive packaging to be used uniformly by all franchisees in identifying the food products associated with the trademark. *Id.* The relevant question, however, is not whether distinctive packaging was necessary but whether it was necessary that it be purchased from Chicken Delight. Because Chicken Delight produced no evidence to demon-

strate *this* proposition the tie-in of paper packaging materials is unjustified as a matter of law.

With respect to the tie-in of dry food mixes and the cooking equipment both sides introduced evidence on the necessity of the tie-in for the purposes of quality control and protection of the good will of the franchise system. The District Court ruled that a question of fact existed and submitted it to the jury under instructions based upon this Court's decision in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949):

> "Tying agreements serve hardly any purpose beyond the suppression of competition. The justification most often advanced in their defense—the protection of the goodwill of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. *The only situation, indeed, in which the protection of goodwill may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied.* In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one. See Miller, Unfair Competition 199 et seq. (1941); Note, 49 Col L Rev 241, 246 (1949). The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also." 337 U.S. at 305-306; emphasis added.

The jury found that Chicken Delight had failed to justify the tie-ins.

This test of justification, limited to situations where specifications for a substitute for the tied product would be impractical, serves both the needs of commerce and the overriding policy of competition. Where a less anti-competitive means of accomplishing the seller's purpose is available the seller is required to utilize it. *Fortner Enterprises, Inc. v. United States Steel Corp., supra,* at 503. Chicken Delight places heavy reliance on the decision of the Second Circuit in *Susser v. Carvel Corp., supra,* on the issue of justification. Petition at 27-29. It is clear, however, that the *Susser* court applied the same standard of impracticability of specification and concluded that under the facts of that case specification to each of the more than 400 franchisees *was* impractical. Two facts should be noted. First, the jury in the instant case found that as a matter of fact specification was not impractical. Second, plaintiffs have never taken the position that Chicken Delight had to specify the product standards to each of the franchisees and permit them to choose the suppliers. Plaintiffs' thesis is and was that Chicken Delight, not being the manufacturer of any of the tied items, could not set itself up as the *sole distributor* of the specified products. Plaintiffs have never taken issue with Chicken Delight's right to designate reliable manufacturers of food mixes or cooking equipment. The injury to plaintiffs arises not at the manufacturing but at the distribution level where Chicken Delight has maintained a contractual monopoly.

II

SPECIAL ANTITRUST RULES ARE NEITHER REQUIRED BY NOR JUSTIFIED IN THE FRANCHISING INDUSTRY

This petition is nothing more nor less than a plea that this Court reject the *per se* doctrine of illegality as applied to tying arrangements, at least when they occur in the trademark franchising industry. The petition is littered with statements which seek to imply that the tying of necessary commodities to a trademark license is, for some inexplicable reason, less anticompetitive than the tying of common salt to a patented machine, preferential routing to strategically located land, or block booking of desirable and undesired copyrighted motion pictures.

Franchising has been heralded as a means of preserving the role of the small entrepreneur, a class of independent merchants capable of competing in an increasingly concentrated economy. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 386-387 (1967) (Justices Stewart and Harlan, concurring in part and dissenting in part); *Susser v. Carvel Corp.*, 206 F.Supp. 636, 640 (S.D.N.Y. 1962). If Chicken Delight were to have its way, this independence would be mere sham. Franchisees would be even less than employees of the franchisor because they would have to invest their private capital for the privilege of being dictated to.

There is another reason that this plea should be rejected. The Sherman Act is a law of general application, designed to reach all anticompetitive activities to the fullest extent permissible within constitutional limits. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Frankfort Distillers, Inc.*, 324 U.S. 293 (1945).

For the last thirty years, this Court has contributed to a process which has reinforced and extended the prohibition against tying arrangements because, whenever such conditions "are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." *Northern Pacific R. Co. v. United States, supra,* at 6. It is far too late in the day for defendants who have used such devices to restrain trade to argue before this Court that the direction of this line of decisions is wrong. Such appeals are appropriately addressed to the Congress not to this Court.

CONCLUSION

The decision of the Court of Appeals properly applied established antitrust principles to the facts of this case and properly determined that the contractual practices of the defendants violated the Sherman Act as a matter of law. There is no basis for this Court to review that decision.

Accordingly, for the reasons set forth above, respondents herein respectfully request that the defendants' Petition for a Writ of Certiorari be denied and further request that the Petition for a Writ of Certiorari filed by respondents herein be granted.

Dated, San Francisco, California,
February 1, 1972.

Respectfully submitted,

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